No. 15294

# United States
# Court of Appeals
## for the Ninth Circuit

SAFEWAY STORES, INCORPORATED,
Appellant,

vs.

SAFEWAY FURNITURE CO., INC., et al.,
Appellees.

# Transcript of Record

**Appeal from the United States District Court for the Southern District of California, Central Division**



Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—12-14-56

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# INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

GIBSON, DUNN & CRUTCHER,
NORMAN S. STERRY,
634 South Spring Street,
Los Angeles 14, California.

For Appellee:

WILLIAM B. MAGID, ESQ.,
1680 No. Vine Street,
Hollywood 28, California.

In the United States District Court, Southern District of California, Central Division

No. 17553—HW

SAFEWAY STORES, INCORPORATED,

Plaintiff,

vs.

SAFEWAY FURNITURE CO., INC., a Corporation; SAFEWAY FURNITURE CO., a Co-Partnership; MORRIS RUDNER, GERALD RUDNER, ROSE RUDNER, MORRIS RUDNER, GERALD RUDNER and DOES I THROUGH V, Inclusive, Co-Partners Doing Business Under the Firm Name and Style of SAFEWAY FURNITURE CO.; DOES I THROUGH V, Inclusive,

Defendants.

## CLAIM FOR PERMANENT INJUNCTION AGAINST UNFAIR COMPETITION

Plaintiff complains of defendants, and each of them, and for cause of action alleges that:

### I.

Plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Maryland and is a citizen of said State.

### II.

Defendant, Safeway Furniture Co., Inc., is a corporation duly organized and existing under and

by virtue of the laws of the State of California and is a citizen of said State. [2*]

III.

Plaintiff is informed and believes and therefore alleges that defendant, Safeway Furniture Co., is a co-partnership between defendant Morris Rudner, defendant Gerald Rudner and defendants Does I through V, inclusive.

IV.

Defendants Morris Rudner, Gerald Rudner and Rose Rudner, and each of them, are citizens of the State of California, residing in the Southern District of California, Central Division.

V.

Plaintiff does not know the true names or capacities (whether individual, associate, corporate or otherwise) of defendants Does I through V, inclusive, or any of them, and therefore sues said defendants, and each of them, by such fictitious names, and prays that their true names and capacities when ascertained may be incorporated herein by appropriate amendment hereto.

VI.

The jurisdiction of this Court is based upon diversity of citizenship, to wit, between the plaintiff, a corporation incorporated under the laws of the State of Maryland, and the defendants, each and all of the individual defendants being citizens of the

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

State of California, and defendant Safeway Furniture Co., Inc., being a corporation incorporated under the laws of the State of California. The amount in controversy, as hereinafter more specifically alleged, greatly exceeds the sum of $3,000, exclusive of interest and costs.

VII.

For many years last past and continuously to date, plaintiff and its predecessors and affiliated corporations have been and now are engaged in operating a large number of retail stores, selling groceries, meat, produce, household supplies such as mops, brooms, furniture polish, floor wax, and expendable items that are used in maintaining a house, and in many of its stores it sells wines [3] and beers. In the United States, from 1926 to 1942, plaintiff owned a number of subsidiary corporations which, in turn, operated the retail stores. During the years 1941 to 1943, plaintiff acquired all of the assets, property and good will, including all rights to the trade names "Safeway Stores, Incorporated," "Safeway Stores" and "Safeway," contained in the operating businessess of all of said subsidiary corporations and since that time plaintiff itself has continuously operated the domestic stores. In the Dominion of Canada, plaintiff has operated continuously from 1929 to date through its wholly owned Canadian subsidiary, formerly named "Safeway Stores, Limited" and now named "Canada Safeway Limited."

VIII.

On June 10, 1944, plaintiff's trade name, "Safeway Stores, Incorporated," was deposited and recorded by plaintiff in the Trademark Division of the United States Patent Office under file No. 4953. Previously, on August 16, 1939, the same name of plaintiff's dissolved Nevada subsidiary was deposited and recorded by plaintiff in said Trademark Division under file No. 4220.

IX.

Plaintiff is qualified to do business in all forty-eight states of the United States and in the District of Columbia and the Territory of Alaska.

X.

As a result of plaintiff's methods of conducting its business and advertising and offering its goods and services for public sale, as hereinafter alleged, plaintiff's business has grown steadily. At the time of filing this action, plaintiff was, and for some time prior thereto had been, operating approximately 489 retail stores in the State of California, and approximately 1,867 retail stores throughout the United States. At said time, plaintiff's Canadian retail subsidiary, Canada Safeway Limited, was operating and now operates approximately 141 stores located in the provinces [4] of Alberta, British Columbia, Manitoba, Ontario and Saskatchewan. Plaintiff's retail stores in the United States are located in the States of California, Arizona, Arkansas, Colorado, Idaho, Iowa, Kansas, Maryland, Missouri, Montana,

Nebraska, Nevada, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Utah, Virginia, Washington and Wyoming, and in the District of Columbia.

XI.

At the time of filing this action plaintiff was, and for some time prior thereto had been, operating approximately 282 stores in plaintiff's Los Angeles Distribution Division which extends from the Southern border of California to and including San Luis Obispo and Bakersfield on the north, said territory being hereinafter referred to as Southern California. Of said 282 stores operated in its Los Angeles Distribution Division, 175 are operated in the County of Los Angeles.

XII.

Since starting operations in the State of California, plaintiff, its affiliates heretofore referred to, and its predecessors in interest have consistently strived to maintain and have maintained a policy of giving a maximum of reliable service and selling the highest quality groceries and meats, produce, and household supplies at the lowest possible cost, and plaintiff has always used great care and gone to great expense in the selection of items of high quality, including numerous nationally known brands, in the marketing of said items at the lowest possible cost to the purchasers and in guaranteeing public satisfaction with all items purchased. Plaintiff in 1926 adopted the arbitrary, coined and distinctive

trade name "Safeway" for use by its affiliated retail stores and in its various advertisements. At the time of filing this action, plaintiff was, and for some time prior thereto had been, using the name of "Safeway" conspicuously in and around each of [5] its stores and the said name was and is printed in distinctive letters in an oblong sign and against a contrasting background.

XIII.

Plaintiff and its predecessors and affiliates have continuously used the word "Safeway" both alone and in combination with the words "Stores, Incorporated" and "Stores" and the said arbitrary, coined and distinctive trade name of "Safeway" now has and for many years last past has had a secondary meaning throughout the United States and Canada and especially in the State of California and in the County of Los Angeles and throughout Southern California as far as retail establishments are concerned, and the word "Safeway" is so understood by the purchasing public to be retail business carried on and conducted by plaintiff.

XIV.

In order to familiarize the consuming public with plaintiff's policy, as aforesaid, and thus to promote the business of plaintiff and its affiliates, plaintiff at all times mentioned herein has sought to make the name "Safeway" synonymous in the minds of purchasers with a reliable business which consistently gives purchasers outstanding dollar value. To

this end, plaintiff, from 1926, to date, has spent very large sums of money in extensively advertising and promoting said name as being synonymous with value and reliability in business. Plaintiff and its affiliates in the United States and Canada have expended a total of approximately $92,942,471 since the year 1942, at a rate in excess of $7,745,205 annually in advertising in newspapers, by radio, television broadcast, magazines, outdoor billboards, public carriers and other various advertising media, the business which it conducts and the goods and services which it offers for sale under its name "Safeway." The total amounts so expended by plaintiff and its affiliates in 1942 and succeeding years through 1953, and the portion of said amounts expended in the State of California, and in Southern California, were [6] as follows:

| Year | Amount | Portion In California | Portion In Southern California |
|---|---|---|---|
| 1942 | $ 4,431,442.06 | $ 954,000 | $ 468,000 |
| 1943 | 3,917,462.94 | 854,000 | 411,000 |
| 1944 | 4,454,950.99 | 977,000 | 475,000 |
| 1945 | 4,959,549.43 | 1,154,000 | 582,000 |
| 1946 | 5,258,370.16 | 1,186,000 | 595,000 |
| 1947 | 7,044,711.53 | 1,622,000 | 856,000 |
| 1948 | 6,517,417.21 | 1,797,000 | 957,000 |
| 1949 | 7,210,244.88 | 2,029,000 | 1,041,000 |
| 1950 | 9,278,988.90 | 2,287,000 | 1,273,000 |
| 1951 | 11,113,222.00 | 2,765,000 | 1,490,000 |
| 1952 | 13,181,660.00 | 3,184,000 | 1,760,000 |
| 1953 | 15,574,445.00 | 3,601,000 | 2,008,000 |
| Total advertising expenditures by plaintiff and its affiliates from 1942 through 1953..... | $92,942,471.00 | The portion thereof in California being: $22,410,000 | The portion thereof in So. Calif. being: $11,916,000 |

XV.

As a result of plaintiff's vast expenditures, as aforesaid, in promoting the patronage of its business and the high quality of the merchandise it has sold and its manner and method of doing business, as hereinbefore alleged, large quantities of goods have been sold by plaintiff in the United States and Canada, and a substantial percentage of said sales has been made in the State of California and in Southern California.

XVI.

All of said advertising was and is intended, in connection with the quality of merchandise sold by it and its business methods, to and did and does build up and maintain and has built up and maintained the reputation, good will and value attached to plaintiff's [7] trade name "Safeway."

XVII.

The name "Safeway" is conspicuously displayed, in the manner herinbefore alleged, in, about and around each office, warehouse, and store operated by plaintiff in Southern California.

XVIII.

Retail sales by plaintiff and its affiliates during the calendar year 1953 were as follows:

| | |
|---|---|
| Retail sales by plaintiff throughout the United States exceeded ..... | $1,578,400,000.00 |
| Retail sales by Canada Safeway Limited exceeded .... | 118,780,000.00 |

Total retail sales in 1953 exceeded ..... $1,697,180,000.00

Plaintiff's retail sales in the State of California alone during the calendar year 1953 were approximately $431,309,000 of which $262,483,000 were made in Southern California.

XIX.

As a result of plaintiff's long and continued efforts to render its customers the best possible service and to sell them its goods at the lowest possible price, and its said advertising efforts, plaintiff and its affiliates have built up a reputation and good will for the name "Safeway" which is worth many millions of dollars to plaintiff. Computed conservatively according to well-recognized accounting principles consistently applied, said good will is valued at approximately $75,000,000, and the goodwill value of the name "Safeway" in California alone is between $20,000,000 and $25,000,000.

XX.

At all times mentioned herein, plaintiff's method of conducting its business and selling its goods and services to the public in the manner hereinbefore alleged, and its advertising of the same under its said name of "Safeway" and its promotional sales work in the State of California and in Southern California has resulted, [8] as aforesaid, in the continued growth and expansion of its business. The aforesaid use of the trade name "Safeway" by plaintiff has been so extensive that at the time of

filing this action and for many years prior thereto the name "Safeway" had become well known to the purchasing public in said State of California and in Southern California as the commercial signature of a reliable retailer who sells products of a high quality at reasonable prices.

XXI.

Plaintiff's stock is listed on the New York, San Francisco and Los Angeles Stock Exchanges and is designated in daily published stock quotations under the name "Safeway Stores" or "Safeway." Due to the nature and extent of the business operations and advertising program of plaintiff, the name "Safeway" has become generally known throughout the United States, including all portions of California, as referring to plaintiff and to its business, and has acquired a synonymous and secondary meaning to the public generally and the citizens of all portions of the State of California, so as to have become associated with plaintiff and its business.

XXII.

Plaintiff is informed and believes and therefore alleges that the defendants, and each of them, at all times mentioned herein well knew and now know of plaintiff's substantial business and of the extensive use and advertising by plaintiff of the name "Safeway" as aforesaid, and well knew and now know of the rights of plaintiff in said name. Both the items sold by plaintiff as aforesaid and the items sold by defendants as hereinafter alleged are

used in the home and are often, if not always, purchased by the same class of consumers.

XXIII.

Plaintiff is informed and believes and therefore alleges that some time in April of 1953, or shortly prior thereto, the defendants Morris Rudner, Gerald Rudner, and Does I to V, inclusive [9] (hereinafter referred to as the "individual defendants"), became co-partners and began doing business under the firm name and style of "Safeway Furniture Co." at 6416 Van Nuys Boulevard, Van Nuys, California, and since said time said individual defendants and each of them under said name have been and are now operating a retail furniture store at said 6416 Van Nuys Boulevard, Van Nuys, California (said business being hereinafter referred to as the "partnership"). Plaintiff is further informed and believes and therefore alleges that on or about June 29, 1953, defendants Morris Rudner and Gerald Rudner and each of them caused to be filed with the County Clerk of Los Angeles County and published in said County a certificate that said defendants were transacting business under the fictitious name "Safeway Furniture Co."

XXIV.

Plaintiff is informed and believes and therefore alleges that on or about July 2, 1953, said individual defendants and defendant Rose Rudner purchased the assets of a retail furniture and appliance business located at 18567 Sherman Way, Reseda, Cali-

fornia, and that said business at the time of said purchase was being operated under the fictitious name and style of "Reseda Furniture Company." Plaintiff alleges that the store in which said business is located was in the same block as one of plaintiff's stores.

XXV.

Plaintiff is informed and believes and therefore alleges that shortly after making said purchase of the Reseda Furniture Company, said individual defendants and defendant Rose Rudner caused the defendant "Safeway Furniture Co., Inc." (hereinafter referred to as the "Furniture Corporation"), to be incorporated and that said individual defendants and defendant Rose Rudner were and are the sole and only stockholders of said Furniture Corporation. Plaintiff alleges that shortly after said incorporation the name of the "Reseda Furniture Company" was changed to "Safeway Furniture Co., Inc.," and [10] that the Furniture Corporation maintained and operated a retail furniture store at said location under said name until on or about January, 1954, when plaintiff is informed and believes and therefore alleges, all of the assets of the Furniture Corporation were sold by said Corporation and the purchaser thereof is now carrying on and conducting a retail business under the name of "Reseda Furniture Company."

XXVI.

Plaintiff is informed and believes and therefore alleges that at the present time and from and after

some time in January, 1954, the Furniture Corporation has not been actively engaged in the conducting of any retail or other business. Plaintiff is informed and believes and therefore alleges that said individual defendants and defendant Rose Rudner, who are the sole stockholders of said Furniture Corporation, and the said defendant Furniture Corporation intend shortly to resume business of the retail sale of furniture under the said name of "Safeway Furniture Co., Inc.," and unless enjoined by the decree of this Court will resume such business under said name.

XXVII.

Plaintiff alleges that at all times that the Furniture Corporation was conducting a retail furniture business in said Reseda, California, its methods of advertising and its use of the name "Safeway" were precisely the same as hereinafter alleged with respect to the conduct of the partnership by the individual defendants. Plaintiff alleges that all averments hereinafter with reference to the name of "Safeway" and the manner and method by which it is and has been used by said individual defendants in conducting the partnership, are intended to and do include the said Furniture Corporation during the period it conducted business under the name of Safeway Furniture Co. at 18567 Sherman Way, Reseda, California. [11]

XXVIII.

Plaintiff alleges that said individual defendants in adopting the name "Safeway Furniture Co." as

the name of the partnership, and in conducting and carrying on the partnership, and that the Furniture Corporation in adopting its name and while it conducted and carried on a store under said name at 18567 Sherman Way, Reseda, California, selected and used the name "Safeway," despite the many other names available to them, for the fraudulent and illegal purpose of competing unfairly with plaintiff and trading upon the name, good will and reputation established by plaintiff under the said name "Safeway," and with the intent and design to lead the public to believe that each of said respective stores was or is sponsored by or connected with the said plaintiff and to trade upon and profit from the name "Safeway" and from good will of and high reputation and standing of said plaintiff.

XXIX.

Plaintiff alleges that the advertising of said individual defendants and of the said Furniture Corporation while it was in business at Reseda was carried on and conducted in various advertising media in such a way as to convey the idea that sales made by it were connected with and sponsored by said plaintiff.

XXX.

Plaintiff alleges that in substantially all of the newspaper and other written advertising of said individual defendants and of said Furniture Corporation during the period it conducted the store at 18567 Sherman Way, Reseda, California, the name

"Safeway" was printed in large letters and the name "Furniture Company" in much smaller letters so as not to be easily discernible or attract attention. Plaintiff further alleges that in most, if not all, the printed advertising of the individual defendants and of the said Furniture Corporation while it was doing business at 18567 Sherman Way, Reseda, California, the name "Safeway" was the most prominent part of each [12] said advertisement; that said name was so used and displayed for the purpose and with the design of trading upon the name, reputation and standing of plaintiff; that in most of said advertisements the word "Safeway" was printed and copied in the block lettering used by the plaintiff; and that such manner and use of the name was designed to imitate and resemble plaintiff's signs and lead defendant's customers and the public to believe the defendants' stores were in some way identified with and sponsored by plaintiff.

XXXI.

Plaintiff has heretofore demanded of defendants, and each of them, that they cease and desist from using the name "Safeway." Notwithstanding such demand defendants and each of them have failed, neglected and refused to comply with such demand and have persisted in using, and the individual defendants now use, the name "Safeway" as aforesaid. Plaintiff is informed and believes and therefore alleges that the individual defendants, and each of them, intend to continue to use the name "Safeway" as aforesaid and otherwise and that the

defendant Furniture Corporation intends soon to resume the use of the name "Safeway" as aforesaid and otherwise, all to the irreparable damage and injury of plaintiff as hereinafter alleged.

XXXII.

Plaintiff is informed and believes and therefore alleges that the individual defendants, and each of them, did not and do not, and that the Furniture Corporation during the period it operated a retail store did not, maintain plaintiff's standards of conducting business or follow plaintiff's policies or render service to their consumers comparable to the service which plaintiff renders and that, unless defendants are enjoined from using the name "Safeway," many members of the purchasing public will believe that the standards of plaintiff's business conduct and the quality of plaintiff's goods or services has fallen through the neglect, inadvertence, incompetence or design of plaintiff, with great and irreparable injury and damage [13] to plaintiff and to the good will of the name "Safeway" far in excess of $3,000.

XXXIII.

Plaintiff has no connection whatever with, and no control whatever over, the business of defendants, or any of them, or the advertising and other business methods employed by defendants. Plaintiff is informed and believes and therefore alleges that unless defendants, and each of them, are enjoined from using the name "Safeway" as aforesaid or otherwise or any other name confusingly similar

to plaintiff's trade name "Safeway," many members of the purchasing public will believe that plaintiff is identified or connected with or is sponsoring defendants, and each of them, to the great and irreparable damage and injury of plaintiff far in excess of $3,000.

XXXIV.

Plaintiff alleges that it is irreparably damaged and injured far in excess of $3,000 by the operation and conduct of any retail store under the name "Safeway" in a manner which leads the public to believe that plaintiff is sponsoring such retail store whether such operation and conduct is by the defendants, or any of them, or by any other person, firm or corporation. Plaintiff alleges that, by its efforts and the manner and method in which it has conducted its retail business and advertised its name "Safeway" as aforesaid, plaintiff has appropriated to itself the name of "Safeway" for all retail business. The defendants herein, and each of them, have adopted and used the said name and used it in the way and manner hereinbefore alleged for the sole purpose of trading upon the good will of said plaintiff and unjustly enriching themselves by so doing. Plaintiff alleges that its appropriation of the name of "Safeway" for retail sales as aforesaid is of the value of many million dollars to it and that the loss or the slightest impairment of plaintiff's exclusive right to said name "Safeway" for the purpose of retail [14] merchandising would damage it greatly in excess of the sum of $3,000.

XXXV.

Plaintiff is informed and believes and therefore alleges that if the defendants, or any of them, continue to use the name "Safeway" for the purpose of retail selling, or if the defendant Furniture Corporation commences to use said name for said purpose, the purchasing public is likely to be confused and believe that the defendants or any other person, firm or corporation also using said name is affiliated with plaintiff or that plaintiff is connected with or sponsoring the use of said name, and that plaintiff would thereby be irreparably damaged and injured in an amount greatly in excess of $3,000; and plaintiff alleges that it is without adequate relief except in this Court of Equity.

Wherefore, plaintiff prays:

1. That a permanent injunction issue restraining defendants, and each and all of them, and their respective officers, agents, servants, employees and attorneys, and all persons in concert or participation with them, or any of them, from in any manner using, leasing, selling, licensing or disposing of or permitting others to use for advertising or other purposes the names "Safeway Furniture Co." or "Safeway Furniture Co., Inc.," or any name including within it the name "Safeway," or any other name confusingly similar to plaintiff's trade name "Safeway," in any manner whatsoever in connection with the operation of the defendants' Safeway Furniture Co. or Safeway Furniture Co., Inc., or

in connection with the retail furniture business being conducted by defendants, or any of them, at 6416 Van Nuys Boulevard, Van Nuys, California, or any other retail furniture or other business whatsoever which any of said defendants may now or hereafter own or organize or in which any of them may own any proprietary interest; and

2. In the alternate that a permanent injunction issue [15] restraining defendants, and each and all of them, and each of their respective officers, agents, servants, employees and attorneys, and all persons in concert or in participation with them, or any of them, in any manner from using the word "Safeway," in imitation of or in any way or manner in which the plaintiff uses it or in the same lettering or form or resembling in any way the use of the said name by said plaintiff, or so as in any manner to indicate to any purchaser that the defendants, or any of them, or any establishment which they are conducting, is connected with or sponsored by the said plaintiff or from using any name similar to "Safeway" in such way or manner as to imitate the word "Safeway" or to intimate that defendants or any of them are in any manner connected with plaintiff; and

3. That plaintiff have and recover its costs herein incurred; and

4. For such other and further relief as to the Court may seem just and proper in the premises.

Dated: November 29, 1954.

NORMAN S. STERRY,
HENRY F. PRINCE,
FREDERIC H. STURDY,
IRA C. POWERS,
JAMES R. HUTTER,
GIBSON, DUNN & CRUTCHER,

By /s/ HENRY F. PRINCE,
Attorneys for Plaintiff.

[Endorsed]: Filed December 1, 1954. [16]

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[Title of District Court and Cause.]

ANSWER

Come Now Defendants Safeway Furniture Co., Inc., a Corporation; Safeway Furniture Co., a Copartnership; Morris Rudner, Gerald Rudner and Rose Rudner individually; Morris Rudner and Gerald Rudner copartners doing business under the firm name and style of Safeway Furniture Co. and for answer to the complaint served upon them, admit, deny and allege:

I.

Admit all the allegations contained in Paragraph II.

II.

Admit that Safeway Furniture Co. is a copartnership between Morris Rudner and Gerald Rudner

but deny that defendants Does I through V, inclusive, are members of said copartnership.

III.

Admit each and every allegation contained in Paragraph IV. [17]

IV.

Deny, both generally and specifically, each and every allegation contained in Paragraph VI and deny that the amount involved exceeds the sum of $3,000, and in this connection alleges that this Court does not have jurisdiction over the subject matter set forth in plaintiff's complaint.

V.

Deny that plaintiff has acquired all the rights to the trade name "Safeway."

VI.

Deny, both generally and specifically, each and every allegation contained in Paragraph XIII and in connection with said denial defendants allege that in the County of Los Angeles alone there are twenty-three "Safeway" listed in the Central Section of the Los Angeles telephone directory, five "Safeway" listed in the Southern Section, two "Safeway" listed in the Northeastern Section, seven "Safeway" listed in the Northwestern Section and three "Safeway" listed in the Western Section and that said "Safeway" refers to many different businesses carried on and conducted by per-

sons, firms and corporations other than the plaintiff herein.

VII.

In answer to Paragraph XIV, defendants allege that they too have sought to make the name "Safeway Furniture" synonymous in the minds of purchasers with a reliable business which consistently gives purchasers outsanding dollar value. To this end, defendants from April, 1952, to date have spent very large sums of money in extensively advertising and promoting the name of "Safeway Furniture" as being synonymous with value and reliability in the furniture business.

VIII.

In answer to Paragraph XXI defendants allege that the name "Safeway" has been and is currently used by divers persons, [18] firms and partnerships in many and varied businesses and is not particularly associated with plaintiff and its business.

IX.

In answer to Paragraph XXII, defendants deny that they well knew and now know of the rights plaintiff claims to have in the name "Safeway" and in that connection allege that plaintiff has no more rights to said name than any other person, firm or partnership.

X.

In answer to Paragraph XXIII, defendants allege that on February 25, 1949, a certificate of doing business under the fictitious firm name of

Safeway Furniture Co. at 8553 South Broadway, Los Angeles, was filed by one Pearl Levy and that thereafter and on or about June 22, 1950, a similar certificate was filed by Frank Kiefer and Sam Simms. That thereafter and on or about April 3, 1952, a certificate of a limited partnership was filed under the name of Safeway Furniture Co., Ltd., showing that the above-named Frank Kiefer and Sam Simms were limited partners, and Morris Rudner was the general partner of said Safeway Furniture Co., Ltd., doing business at 6416 Van Nuys Blvd. Thereafter and on or about June 29, 1953, Morris Rudner and Gerald Rudner caused a certificate to be filed in the office of the Clerk of the County of Los Angeles under the name of Safeway Furniture Co. at 6416 Van Nuys Blvd., Van Nuys, California. That thereafter and on or about June 4, 1954, Frank Kiefer filed a certificate with the Clerk of the County of Los Angeles showing that he was doing business under the fictitious firm name of Safeway Furniture Co. in Los Angeles, California.

XI.

In answer to Paragraph XXVI, defendants deny that the defendants either individually or as a corporation intend shortly or ever to resume business under the name Safeway Furniture Co., Inc. [19]

XII.

In answer to Paragraph XXVII, defendants allege that Safeway Furniture Co., Inc., has ceased

to do business and it is not intended that said corporation shall engage in any retail furniture business or in any other business at all.

XIII.

In answer to Paragraph XXVIII, defendants deny that the name Safeway Furniture Co., Inc., was adopted by the corporation for any fraudulent and illegal purpose at all and in this connection allege that the name Safeway Furniture Co., Inc., was adopted by the corporation because the principals thereof were the individuals who owned Safeway Furniture Co., a partnership, and in further connection with said paragraph, defendants deny both generally and specifically, each and every allegation contained in Paragraph XXVIII.

XIV.

In answer to Paragraph XXIX, defendants deny, both generally and specifically, each and every allegation contained therein.

XV.

In answer to Paragraph XXX, defendants deny, both generally and specifically, each and every allegation contained therein.

XVI.

In answer to Paragraph XXXI, defendants deny, both generally and specifically, each and every allegation contained therein and especially deny that the corporation intends to resume the use of the

name Safeway Furniture Co., Inc., either soon or at any time in the foreseeable future.

XVII.

In answer to Paragraph XXXIII, defendants deny each and every allegation contained [20] therein.

XVIII.

In answer to Paragraph XXXIII, defendants admit that plaintiff has no connection whatsoever with the business of the defendants but except as herein specifically admitted, deny each and every allegation contained therein.

XIX.

In answer to Paragraph XXXIV, defendants deny, both generally and specifically, each and every allegation contained therein and in this connection defendants specifically allege that they adopted the name Safeway Furniture Co. because that was the name of the furniture business in which they purchased an interest from the above-mentioned Frank Kiefer and Sam Simms in April, 1952.

XX.

In answer to Paragraph XXXV, defendants deny, both generally and specifically, each and every allegation contained therein and in this connection allege that the purchasing public is more intelligent than plaintiff would have this Court believe, and further allege that no customers of the defendants ever entered defendants' store believing they were

in a store owned, operated, sponsored, or in any way, shape, or manner, connected with the plaintiff.

Wherefore defendants pray that plaintiff's complaint be dismissed; that defendants have and recover their costs herein incurred; and that they have such other and further relief as may be fit and proper in the premises.

Dated: December 23, 1954.

/s/ WILLIAM B. MAGID,
Attorney for Defendants.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed December 23, 1954. [21]

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[Title of District Court and Cause.]

PLAINTIFF'S REQUESTS FOR ADMISSIONS

Plaintiff herein requests, in accordance with Rule 36 of the Federal Rules of Civil Procedure, that defendants, and each of them, admit that the facts and each of them hereinafter set forth are true. A response by defendants and each of them, to this request shall be made not later than 20 days subsequent to the date of service of this Plaintiff's Request for Admissions. The response requested is to be made in accordance with Rule 36 of the Federal Rules of Civil Procedure:

Request No. 1: Plaintiff was as of the date of the filing of the complaint herein and is now a cor-

poration duly organized and existing under and by virtue of the laws of the State of Maryland, and was as of that date and is now a citizen of the State of Maryland.

Request No. 2: Defendant Safeway Furniture Co., Inc., [23] was as of the date of the filing of the complaint herein and is now a corporation duly organized and existing under and by virtue of the laws of the State of California, and was as of that date and is now a citizen of the State of California.

Request No. 3: Defendant Morris Rudner was as of the date of the filing of the complaint herein and is now a citizen of the State of California.

Request No. 4: Defendant Gerald Rudner was as of the date of the filing of the complaint herein and is now a citizen of the State of California.

Request No. 5: Defendant Rose Rudner was as of the date of the filing of the complaint herein and is now a citizen of the State of California.

Request No. 6: Defendant Safeway Furniture Co., a co-partnership, was as of the date of the filing of the complaint herein and is now a citizen of the State of California.

Request No. 7: Plaintiff, its predecessors in interest, and wholly-owned subsidiaries have continually since 1926 used, throughout the County of Los Angeles, the word "Safeway" as their trade name or as the dominant portion thereof in connection with the operation of a chain of retail stores

throughout the County of Los Angeles selling groceries, meats and food produce. Continually since 1926 those retail stores in the County of Los Angeles have also vended a number of expendable household items such as mops, brooms, furniture polish and floor wax.

Request No. 8: On December 31, 1942, plaintiff acquired from its then wholly-owned subsidiaries, Safeway Stores, Inc., a [24] California corporation, and Safeway Stores, Inc., a Nevada corporation, all of their assets, including their retail grocery stores, their good will and their right to use the trade name "Safeway" in connection with the operation of retail grocery stores throughout the State of California and throughout the County of Los Angeles.

Request No. 9: Since 1926 and at least since prior to 1940 the trade name "Safeway," as used by plaintiff, its predecessors in interest, and wholly-owned subsidiaries, has acquired a secondary meaning in the County of Los Angeles as having reference to the retail business of the plaintiff, consisting of the operation of a chain of retail stores throughout of the County of Los Angeles selling groceries, meats, and food produce, and a number of expendable household items such as mops, brooms, furniture polish and floor wax.

Request No. 10: The word "Safeway" has become associated in the minds of the purchasing retail public with the plaintiff's retail stores, so that

when the word "Safeway" is used in the County of Los Angeles it is understood by the purchasing public to refer to the retail stores of the plaintiff and the retail merchandising operations conducted therein. Said association and understanding by the purchasing public has existed for many years and at least since prior to 1940 both as such retail stores have been operated by the plaintiff, by its predecessors in interest, and its former wholly-owned subsidiaries.

Request No. 11: Plaintiff, its predecessors in interest, and wholly-owned subsidiaries have continually since 1926 used, throughout the State of California, the word "Safeway" as their trade name or as the dominant portion thereof in connection with the operation of a chain of retail stores throughout the State of California selling groceries, meats and food produce. Continually since 1926, those retail stores in the State of California have also vended a number of expendable household items such as [25] mops, brooms, furniture polish and floor wax.

Request No. 12: Since 1926 and at least since prior to 1940 the trade name "Safeway," as used by plaintiff, its predecessors in interest, and wholly-owned subsidiaries, has acquired a secondary meaning in the State of California as having reference to the retail business of the plaintiff, consisting of the operation of a chain of retail stores throughout the State of California, selling groceries, meats and food produce, and a number of expendable house-

hold items such as mops, brooms, furniture polish and floor wax.

Request No. 13: The word "Safeway" has become associated in the minds of the purchasing retail public with the plaintiff's retail stores, so that when the word "Safeway" is used in the State of California it is understood by the purchasing public to refer to the retail stores of the plaintiff and the retail merchandising operations conducted therein. Said association and understanding by the purchasing public has existed for many years and at least since prior to 1940 both as such retail stores have been operated by the plaintiff, by its predecessors in interest, and its former wholly-owned subsidiaries.

Request No. 14: The matter contained in Exhibit "A" hereto is a true and correct copy, as to size, contents and relative size of the various words used therein, of advertisements appearing in the Van Nuys News, a newspaper of general circulation, on January 6 and January 13, 1955.

Request No. 15: The matter contained in Exhibit "B" hereto is a true and correct copy, as to size, contents and relative size of the various words used therein, of advertisements appearing in the Van Nuys News, a newspaper of general circulation, on January 20 and January 27, 1955.

Request No. 16: The matter contained in Exhibit "C" hereto is a true and correct copy, as to size, contents and relative size of the various words used therein, of advertisements [26] appearing in the

Van Nuys News, a newspaper of general circulation, on February 3, 10, 17, 24 and March 3 and 10, 1955.

Request No. 17: The matter contained in Exhibit "D" hereto is a true and correct copy, as to size, contents and relative size of the various words used therein, of advertisements appearing in the Van Nuys News, a newspaper of general circulation, on October 27, November 3, 10, 17 and 24, 1955.

Request No. 18: The matter contained in Exhibit "E" hereto is a true and correct copy, as to size, contents and relative size of the various words used therein, of advertisements appearing in the Van Nuys News, a newspaper of general circulation, on August 18, 1955.

Request No. 19: The matter contained in Exhibit "F" hereto is a true and correct copy, as to size, contents and relative size of the various words used therein, of advertisements appearing in the Van Nuys News, a newspaper of general circulation, on August 25, 1955.

Request No. 20: The matter contained in Exhibit "G" hereto is a true and correct copy, as to size, contents and relative size of the various words used therein, of advertisements appearing in the Van Nuys News, a newspaper of general circulation, on September 1, 8, 15, 22 and 29, 1955.

Request No. 21: The matter contained in Exhibit "H" hereto is a true and correct copy, as to size,

contents and relative size of the various words used therein, of advertisements appearing in the Van Nuys News, a newspaper of general circulation, on December 8, 15, 22 and 29, 1955.

Request No. 22: The matter contained in Exhibit "I" hereto is a true and correct copy, as to size, contents (except for the words "News, Van Nuys, Calif.—Thursday, Jan. 15, 1953" appearing at the top of the advertisement and the words "Received Jan 16 '53 PM" which appear at the bottom of the advertisement) and [27] relative size of the various words used therein, of the advertisement appearing in the Van Nuys News, a newspaper of general circulation, on January 15, 1953.

Request No. 23: The matter contained in Exhibit "J" hereto is a true and correct copy, as to size, contents (except for the underlining of the word "Safeway's" appearing twice on the right-hand side of the advertisement and the circling of the word "Safeway" at the bottom of the advertisement) and relative size of the various words used therein, of the advertisement appearing in the Van Nuys News, a newspaper of general circulation, on October 2, 1952.

Request No. 24: The matter contained in Exhibit "K" hereto is a true and correct copy, as to size, contents and relative size of the various words used therein, of the advertisement appearing in the Van Nuys News, a newspaper of general circulation, on August 20, 1953.

Request No. 25: The matter contained in Exhibit "L" hereto is a true and correct copy, as to size, contents and relative size of the various words used therein, of the advertisement appearing in the Van Nuys News, a newspaper of general circulation, on August 27, 1953.

Request No. 26: The matter contained in Exhibit "M" hereto is a true and correct copy, as to size, contents and relative size of the various words used therein, of the advertisement appearing in the Van Nuys News, a newspaper of general circulation, on November 16, 1952.

Request No. 27: The matter contained in Exhibit "N" hereto is a true and correct copy, as to size, contents (except for the circling of the words "Safeway's" twice on the left-hand side of the advertisement) and relative size of the various words used therein, of the advertisement appearing in the Van Nuys News, a newspaper of general circulation, on July 23, 1953. [28]

Request No. 28: The matter contained in Exhibit "O" hereto is a true and correct copy, as to size, contents and relative size of the various words used therein, of the advertisement appearing in the Van Nuys News, a newspaper of general circulation, on December 1, 1955.

Request No. 29: The advertisements designated in each of the "Requests" numbered 14-28 above, and each of them, were inserted in the Van Nuys News at the instance and request of defendants,

Safeway Furniture Co., a partnership, Morris Rudner, Gerald Rudner and each of them. The format and composition of each of said advertisements was made up by the aforesaid defendants and each of them. The advertisements and each of them were paid for by the aforesaid defendants and each of them.

Request No. 30: The Van Nuys News is a newspaper currently published and vended three times weekly on each Tuesday, Thursday and Sunday. Said newspaper has been published and vended three times weekly on each Tuesday, Thursday and Sunday since October 3, 1955 and on each such publication date has been vended to the general public throughout the City of Van Nuys and generally throughout the San Fernando Valley west of Coldwater Canyon. Between October 1, 1952 and October 3, 1955, the Van Nuys News was published and vended twice weekly each Thursday and Sunday and has been vended on each such publication date to the general public throughout the City of Van Nuys and throughout the San Fernando Valley west of Coldwater Canyon.

Request No. 31: That the document attached hereto as Exhibit "P" is a true and correct copy of a letter received by Safeway Furniture Company, Inc., Morris Rudner, Rose Rudner and Gerald Rudner in October, 1953, from Norman S. Sterry.

Request No. 32: During the calendar year ended December 31, 1953, the retail sales by the plaintiff

throughout those states of the United States wherein it operated, amounted to [29] at least One Billion Five Hundred Seventy-eight Million Four Hundred Thousand Dollars ($1,587,400,000.00). During the calendar year ended December 31, 1953, the retail sales by the plaintiff throughout California amounted to at least Four Hundred Thirty-one Million Three Hundred Nine Thousand Dollars ($431,309,000.00). During the calendar year ended December 31, 1953, the retail sales by plaintiff throughout Southern California amounted to at least Two Hundred Sixty-two Million Four Hundred Eighty-three Thousand Dollars ($262,483,000.00). During the calendar year ended December 31, 1953, retail sales by Canada Safeway, Ltd., a wholly-owned subsidiary of plaintiff operating in Canada, amounted to at least One Hundred Eighteen Million Seven Hundred Eighty Thousand Dollars ($118,780,000.00). During the calendar year ended December 31, 1953, total retail sales by plaintiff and by Canada Safeway, Ltd., amounted to at least One Billion Six Hundred Ninety-seven Million One Hundred Eighty Thousand Dollars ($1,697,180,000.00).

Request No. 33: The facts set forth in the affidavit of Drummond Wilde attached hereto as Exhibit "Q" are true.

Request No. 34: Since 1926 the name "Safeway," both alone and as the dominant part of the word "Safeway" combined with other words has been extensively advertised throughout Southern

California and Los Angeles County by plaintiff and the predecessors in interest of plaintiff as those predecessors are set forth in the affidavit of Drummond Wilde, attached hereto as Exhibit "Q." Said advertising has created in the minds of the public in Southern California and Los Angeles County, an association of the word "Safeway" with the retail stores operated by plaintiff and formerly by its predecessors in interest. This [30] association has existed at least since 1940.

Dated: March 14, 1956.

GIBSON, DUNN & CRUTCHER,
NORMAN S. STERRY,
HENRY F. PRINCE,
FREDERIC H. STURDY,
IRA C. POWERS,
JAMES R. HUTTER,

By /s/ NORMAN S. STERRY,
Attorneys for Plaintiff.

[Endorsed]: Filed March 15, 1956.

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[Title of District Court and Cause.]

## STIPULATION ALLOWING AMENDMENT BY INTERLINEATION TO COMPLAINT AND ORDER OF COURT

It Is Hereby Stipulated and Agreed by and between Plaintiff and Defendants (other than De-

fendants Does), through their respective undersigned attorneys of record that the complaint of Plaintiff herein entitled "Claim for Permanent Injunction Against Unfair Competition" may be amended by interlineation in the following respects:

I.

In Paragraph XVIII of said Complaint the figure "$1,578,400.00," appearing on line 10, page 7, may be interlined to read "$1,578,400,000.00."

II.

In Paragraph XVIII of said Complaint the figure "$118,780.00," appearing on line 12, page 7, may be interlined to read "$118,780,000.00." [53]

III.

In Paragraph XVIII of said Complaint the figure "$1,697,180.00," appearing on line 13, page 7, may be interlined to read "$1,697,180,000.00."

It Is Further Stipulated and Agreed that the figures to be inserted by amendment are correct and that defendants do not desire to plead thereto.

Dated: May 15th, 1956.

NORMAN S. STERRY,
HENRY F. PRINCE,
FREDERIC H. STURDY,
IRA C. POWERS,

JAMES R. HUTTER,
GIBSON, DUNN & CRUTCHER,

By /s/ NORMAN S. STERRY,
Attorneys for Plaintiff;

/s/ WILLIAM B. MAGID,
Attorney for Defendants.

Dated: May 15, 1956.

The above Stipulation is approved this 15th day of May, 1956, and it is ordered that the Provisions of Local Rule 4(d) are hereby waived and that the above-stipulated amendments shall be made by interlineation.

/s/ HARRY C. WESTOVER,
Judge.

[Endorsed]: Filed May 15, 1956. [54]

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[Title of District Court and Cause.]

STIPULATION AND ORDER

Whereas, there has previously been filed in this action on behalf of plaintiff "Requests for Admissions";

Whereas, said "Requests for Admissions" were filed on March 15, 1956;

Whereas, said "Requests for Admissions" were duly served upon defendants and each of them;

Whereas, at the deposition of Morris Rudner, commenced by plaintiff on March 22, 1956, the at-

torney of record for defendants read into the record his responses to said "Requests for Admissions";

Whereas, at said deposition the parties stipulated through their respective attorneys of record that the aforesaid responses would constitute the required responses to the "Requests for Admissions."

Now, therefore, It Is So Stipulated by and between the [55] plaintiff and all defendants other than defendants Does through their respective counsel, and it is further stipulated that the following were the responses so given.

Requests Nos. 1, 3, 4, 5, 7, 8, 14 through and including 28, 30, 32, 33. Defendants and each of them admit all of the matters stated or referred to in said request.

Request No. 2. Defendants and each of them admit the matters therein stated except that they and each of them deny that defendant, Safeway Furniture Co., Inc., is now a corporation duly organized or existing and further deny that said defendant is now a citizen of the State of California.

Request No. 6. Defendants and each of them admit the matters therein stated except that the defendants and each of them deny that Safeway Furniture Co., is now a co-partnership and that said co-partnership is now a citizen of the State of California.

Request No. 9. Denied.

Request No. 10. Denied.

Request No. 11. Defendants and each of them admit the matters therein stated except that they and each of them deny the last sentence thereof beginning on line 30 of Page 3 of said "Request for Admissions."

Request No. 12. Denied.

Request No. 13. Denied.

Request No. 29. Denied.

Request No. 31. Denied.

Request No. 34. Defendants and each of them admit the matters stated in the first sentence of said Request No. 34. Defendants and each of them deny the remainder of said [56] Request No. 34.

Dated: May 15, 1956.

GIBSON, DUNN & CRUTCHER,
NORMAN S. STERRY,
HENRY F. PRINCE,
FREDERIC H. STURDY,
IRA C. POWERS,
JAMES R. HUTTER,

By /s/ NORMAN S. STERRY,
Attorneys for Plaintiff;

WILLIAM B. MAGID,

By /s/ WILLIAM B. MAGID,
Attorney for Defendants.

It Is So Ordered.

Dated May 15, 1956.

/s/ HARRY C. WESTOVER,
Judge.

[Endorsed]: Filed May 15, 1956.

[Received in evidence as Plaintiff's Exhibit No. 8, May 25, 1956.] [57]

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[Title of District Court and Cause.]

STIPULATION AND ORDER

It Is Hereby Stipulated and Agreed by and between plaintiff and defendants (other than defendants Does), by and through their respective undersigned attorneys of record that the following facts are true and correct and, except as stated, shall be deemed fully established for purposes of trial in the above-entitled case without further proof or foundation.

I.

Total aggregate net sales of Safeway Stores, Inc., a Maryland corporation, and its subsidiaries during 1955, were $1,932,243,202.00, which figure was an increase of $118,726,566.00 over total aggregate net sales of Safeway Stores, Inc., and its subsidiaries during 1954. The above figures are for the calendar years mentioned. Objections to the relevancy and materiality of the foregoing are reserved. [58]

II.

Since at least as far back as July 1, 1926, and up through December 31, 1941, the predecessors in interest of plaintiff as those predecessors are set forth in the affidavit of Drummond Wilde, attached as Exhibit "Q" to plaintiff's Requests for Admissions filed in the above-entitled Court on March 15, 1956, incurred for each fiscal year as hereinbelow set forth, substantial advertising expenditures in Los Angeles County and throughout the counties comprising Southern California. These advertising expenditures have been in connection with the promotion of products in retail stores bearing the name "Safeway," which name has been featured in said advertisements. The following are the actual advertising expenditures for the years listed and for the counties hereinafter listed. A substantial portion of such expenditures, and at least 25% thereof were incurred advertising within Los Angeles County during each year hereinafter set forth.

| | |
|---|---|
| 1926—(7/1/26 to 12/31/26) | $ 77,287.41 |
| 1927—(Calendar year) | 162,441.15 |
| 1928— " " | 159,014.92 |
| 1929— " " | 215,421.23 |
| 1930— " " | 300,784.46 |
| 1931— " " | 239,888.55 |
| 1932— " " | 276,880.75 |
| 1933— " " | 288,180.28 |
| 1934— " " | 199,156.52 |
| 1935— " " | 202,605.77 |
| 1936— " " | 268,651.60 |

| | | | |
|---|---|---|---|
| 1937— | " | " | .....$383,038.84 |
| 1938— | " | " | ..... 295,959.38 |
| 1939— | " | " | ..... 284,094.74 |
| 1940— | " | " | ..... 317,014.16 |
| 1941— | " | " | ..... 323,102.45 |

III.

The above advertising expenses were incurred in Los Angeles County, Orange County, Riverside County, Kern County, Santa Barbara County, Ventura County, San Bernardino County, San Luis Obispo County, Inyo County, and for the period from 1926 through 1931 in San Diego County also.

IV.

Since 1925, plaintiff and its predecessors in interest as those predecessors are set forth in the affidavit of Drummond Wilde, attached as Exhibit "Q" to plaintiff's Requests for Admissions filed in the above-entitled court on March 15, 1956, regularly used and plaintiff now uses various media of advertising; that the most important of such media, at least from the standpoint of the amount of money expended has always been, and is, newspaper advertising; that other media of advertising regularly used ever since 1925 and still used, consist of billboard advertising, car-card advertising, magazine advertising, handbill advertising, circular or leaflet advertising and radio advertising; that after the advent of television, advertising by this medium has been regularly carried on; that all of said media have been used in California and elsewhere during

the periods above indicated and all of them are now used in California and elsewhere by the plaintiff. Since 1925, plaintiff and its predecessors in interest as above defined, have advertised in newspapers in the Los Angeles County metropolitan and in the San Francisco metropolitan area, and in many other areas of California, at least once a week and in some cases more often (except for brief periods when stores were closed because of work stoppages). Plaintiff at the present time regularly advertises in approximately 1,000 newspapers throughout the United States, including more than 200 in California. In said newspapers, advertisements are normally run at least once a week and in some cases more often. These 200 newspapers include [60] several newspapers published and distributed in the San Fernando Valley. Advertisements in newspapers published and distributed in the San Fernando Valley have been regularly carried by the plaintiff for a considerable number of years and at least as far back as 1940. In the newspaper advertising of plaintiff in California and elsewhere, and of its predecessors in interest as above defined, as each has advertised for the period above set forth, the word "Safeway" has appeared and now appears prominently in each advertisement. In some newspaper advertisements during the early 1930's, the word "Safeway" was used in connection with the word "Store" or "Stores." In the vast majority of such advertisements the word "Safeway" was used alone. Beginning at about 1940 and continuously ever since, the word "Safeway" alone has been

used. That in all other advertising, in addition to newspaper advertising, as above set forth, the word "Safeway" has been prominently used and, for the most part, only the word "Safeway" has been used in identifying plaintiff and its aforesaid predecessors in interest. In March, 1941, plaintiff and said predecessors in interests, adopted the policy that all company operated retail outlets should be operated under the name "Safeway" alone; that, thereafter, as soon as possible, all signs on stores and parking lots of plaintiff and said predecessors used only the word "Safeway."

V.

During the year 1950, plaintiff had nineteen (19) retail stores operating in the San Fernando Valley under the name of "Safeway." The number of such stores in the San Fernando Valley at present is twenty-three (23), which stores, and each of which, operate under the name "Safeway." Since at least as far back as the [61] year 1927, plaintiff and its predecessors in interest, as those predecessors are set forth in the affidavit of Drummond Wilde, attached as Exhibit "Q" to plaintiff's Requests for Admissions filed in the above-entitled court on March 15, 1956, have maintained a number of retail stores in the San Fernando Valley. In 1927, said number of stores was fourteen (14). Said stores have always borne the name "Safeway," either alone or in conjunction with the word "Stores" or "Stores, Inc." Since sometime in 1941, each of said stores operated in the San Fernando Valley has always borne the name "Safeway" alone.

Dated: May 15, 1956.

GIBSON, DUNN & CRUTCHER,
NORMAN S. STERRY,
HENRY F. PRINCE,
FREDERIC H. STURDY,
IRA C. POWERS,
JAMES R. HUTTER,

By /s/ NORMAN S. STERRY,
Attorneys for Plaintiff;

WILLIAM B. MAGID,

By /s/ WILLIAM B. MAGID,
Attorney for Defendants.

It Is So Ordered.

Dated: May 15, 1956.

/s/ HARRY C. WESTOVER,
Judge.

[Endorsed]: Filed May 15, 1956.

[Received in evidence as Plaintiff's Exhibit No. 10. May 25, 1956.] [62]

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[Title of District Court and Cause.]

## STIPULATION AND ORDER

Subject to its competency, relevancy and materiality, the plaintiff, at the request of the defendant Morris Rudner, stipulates with said defendant that the following facts are true and correct, and except

as hereinafter stated, shall be deemed to be fully established for the purpose of the trial in the above-entitled action without further proof or foundation:

I.

That since 1925 there have been approximately ninety-six (96) listings with the County Clerk of Los Angeles County of either fictitious or corporate names employing as part of the name the word [63] "Safeway" in conjunction with other words. That in many cases there has been more than one such listing by the same individual, individuals or corporation engaged in the particular business listing the name that includes the word "Safeway"; that the aforesaid ninety-six (96) listings include said duplications. Among those listed, with the dates on which the particular names were filed, are the following:

Safeway Stores, Inc.—February 24, 1925.
Safeway Stores Incorporated, a Nevada corporation—January 18, 1940.
Safeway Stores, Inc., of Nevada—June 2, 1941.
Safeway Stores, Incorporated, a Maryland corporation—April 14, 1943.
Safeway Furniture Co.—February 25, 1949.
Safeway Furniture Co., Ltd.—April 3, 1952.
Safeway Accident Insurance Associates—March 2, 1927.
Safeway Auto Driving System—March 6, 1934.
Safeway Auto Finance Co.—June 23, 1926.
Safeway Auto Parks—May 1, 1930.

Safeway Auto Sales—December 2, 1947.
Safeway Building Service—October 10, 1938.
Safeway Cab Co.—April 26, 1926.
Safeway Cleaners—January 26, 1932.
Safeway Cleaners & Dyers—April 4, 1925.
Safeway Cleaners & Dyers in Santa Monica—October 25, 1928.
Safeway Construction Co.—December 9, 1937.
Safeway Drug Company—June 25, 1940.
Safeway Household Products—February 18, 1948.
Safeway Mattress Company—October 30, 1946.
Safeway Lock Co.—October 27, 1926. [64]
Safeway Rubber Co.—May 6, 1927.
Safeway Truck and Transfer Co.—January 21, 1927.
Safeway Service of Burbank—December 9, 1952.

Plaintiff does not stipulate to or admit the relevancy or the materiality of the foregoing or in any way stipulate that the fact that said names have been filed with the County Clerk of Los Angeles County in any way indicates or tends to prove that any business was conducted under any of said names or if any such business was ever started that it presently continues. The plaintiff expressly denies that such filings in any way tend to prove that any such business was ever actually conducted under any said name or names.

The first four names listed are those of the plaintiff or its predecessors in interest, and plaintiff suc-

ceeded to all rights of said predecessors in said names. The first one in point of time to file with the County Clerk of Los Angeles County under the name "Safeway" was plaintiff or one of its said predecessors in interest.

II.

The following listings appear in the 1955-1956 Los Angeles metropolitan area telephone directories, in addition to the listings of the plaintiff and defendants.

Central Section, published June, 1955:

Safeway Brake & Motor Service.
Safeway Brake Service.
Safeway Cleaners.
Safeway Finance Co.
Safeway Furniture (on South Broadway).
Safeway Heating Service, Inc.
Safeway Laundry.
Safeway Laundry and Cleaners.
Safeway Liquor Store.
Safeway Mattress Co.
Safeway Metal Polishing. [65]
Safeway Plumbing & Heating, Inc.
Safeway Sign Co.
Safeway Steel Scaffolds Div. of Safeway Steel Products, Inc.
Safeway Tire Service.
Safeway Van Lines.

Southern Section, published October, 1955:

Safeway Cleaners.
Safeway Driving Schools.

Safeway Payments Co.
Safeway Sign Co.

Northeastern Section, published December, 1955.
Safeway Electric Co.
Safeway Termite Control Co.

Northwestern Section, published March, 1956:
Safeway Motors.
Safeway Termite Control Co., Pasadena.

Western Section, published February, 1956:
None.

Plaintiff does not in any way stipulate that the listings or any particular listing indicates that there ever was or presently is any business being conducted under any of the above names; nor does plaintiff stipulate to the relevancy or the materiality of the above listings.

Dated: May 16th, 1956.

GIBSON, DUNN & CRUTCHER,
NORMAN S. STERRY,
HENRY F. PRINCE,
FREDERIC H. STURDY,
IRA C. POWERS,
JAMES R. HUTTER,

By /s/ NORMAN S. STERRY,
Attorneys for Plaintiff; [66]

WILLIAM B. MAGID,

By /s/ WILLIAM B. MAGID,
Attorney for Defendants.

It Is So Ordered.

Dated: May 21, 1956.

/s/ HARRY C. WESTOVER,
Judge.

[Endorsed]: Filed May 21, 1956.

[Received in evidence as Defendants' Exhibit B May 25, 1956.] [67]

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[Title of District Court and Cause.]

ORDER DISMISSING PARTIES

Whereas, the above-entitled cause regularly came on for trial on May 24, 1956; and

Whereas, plaintiff Safeway Stores, Incorporated, appeared by and through its attorney, Norman S. Sterry, Esquire; and

Whereas, defendants Safeway Furniture Co., Inc., a corporation; Safeway Furniture Co., a co-partnership; Morris Rudner, Gerald Rudner and Rose Rudner appeared through their attorney, William B. Magid, Esquire; and

Whereas, plaintiff, through its attorney, moved to dismiss as to all fictitious parties; and

Whereas, plaintiff, through its attorney, moved to dismiss without prejudice as to defendants Safeway Furniture Co., Inc.; Rose Rudner and Gerald Rudner; and

Whereas, the Court granted said motions in open Court;

Now, Therefore, It Is Hereby Ordered, [68] Adjudged and Decreed:

1. That defendants Does I through V are hereby dismissed from the above-entitled lawsuit;

2. Defendants Safeway Furniture Co., Inc.; Rose Rudner and Gerald Rudner are dismissed from said lawsuit without prejudice to plaintiff's right to renew the same.

Dated: June 6, 1956.

/s/ HARRY C. WESTOVER,
Judge.

[Endorsed]: Filed June 6, 1956.

Docketed and entered June 11, 1956. [69]

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[Title of District Court and Cause.]

## MEMORANDUM OF OPINION

This is an action for unfair competition. Plaintiff is the owner and operator of a large chain of retail food and grocery stores. The stores sell groceries, meats, vegetables, incidental notions, kitchen hardware, et cetera. Plaintiff and plaintiff's predecessors since 1925 have been using the name "Safeway," and the name "Safeway" has attained a secondary meaning in the Southern California area as indicating a retail food and grocery store, oper-

ated by plaintiff organization. There is no question that in the minds of thousands of residents of Southern California the word "Safeway" means the Safeway retail grocery and food [70] stores operated by plaintiff.

Sometime prior to 1952 there had been organized and operated in Van Nuys, California, a small furniture store which was and is now known as Safeway Furniture Co., Inc. In April, 1952, defendant Morris Rudner purchased an interest in the Safeway Furniture Co., Inc., and one year later he bought out his co-owners, so that after April 1, 1953, he owned the Safeway Furniture Co., Inc., in Van Nuys in its entirety. Since that date he has conducted the business under the name of Safeway Furniture Co., Inc. He did not attempt to change the name, inasmuch as it would entail considerable expense to change the name, signs, stationery, et cetera, in connection therewith.

This action was filed on December 1, 1954. Plaintiff alleges unfair competition in the use of the name "Safeway." After an extensive hearing in this matter the Court will find the word "Safeway" has a secondary meaning in Southern California, including the Van Nuys area, but there is no evidence of any kind that defendant has attempted to trade upon the reputation and name of plaintiff.

The Court will also find there is no competition between the Safeway food markets and the Safeway furniture store. Although "Safeway" has a secondary meaning in Southern California and al-

though Van Nuys is a city within the area, nevertheless the Safeway organization of retail food and grocery stores does not have a Safeway store within the city limits of Van Nuys, the nearest being approximately two miles distant from the defendant's store. However, under present modern transportation facilities no doubt many persons living in Van Nuys patronize a Safeway food and grocery market outside the city limits. There is no evidence [71] in this case that there has been any confusion between the two stores, as no one testified they went into defendant's store thinking it was plaintiff's, or vice versa; and there has been no evidence that defendant at any time attempted to "palm off" any of his merchandise as being that of plaintiff.

It was plaintiff's original contention that it had the exclusive right to the use of the name "Safeway." Inasmuch as there was no evidence of competition or confusion between plaintiff and defendant the Court asked for memoranda of points and authorities relative to the right to restrain the use of the name in a non-competitive business. In its brief plaintiff now contends it can prevent any other retail establishment from using the word "Safeway," even though such establishment is not in direct competition with plaintiff.

The problem thus presented to the Court is rather simple—Can the plaintiff monopolize the word "Safeway" in relation to retail trade in Southern California in the absence of competition?

Plaintiffs has cited a number of authorities to the Court, among which is the case of Phillips vs. The Governor & Co., etc., 79 F.2d 971, in which at page 974 the Court says:

> "* * * defendant contends that there is no 'competition' between them, and therefore there can be no 'unfair competition.' This court, however, has carefully considered the question in Del Monte Special Food Co. v. California Packing Corporation (C.C.A.) 34 F.(2d) 774, and has held that the two products need not be competitive * * *" [72]

Plaintiff herein also relies upon a recent case of the Ninth Circuit, North American Air Coach Systems, Inc., vs. North American Aviation, Inc., 231 F.2d 205. In that case the plaintiff claimed it had the sole and exclusive right to use the name "North American" in connection with airplanes and aviation. The Ninth Circuit points out that in the North American case there was overwhelming proof of confusion of source. Instances of actual confusion in the minds of the public were stacked high in the record. The trial court had also found the acts of defendant were designed, intended and calculated to cause confusion and had already misled numerous members of the general public.

In the case at bar the Court expressly finds there has been no confusion in the minds of the public between plaintiff's food and grocery stores and defendants' furniture store, and there is no evidence

that anyone has been misled because of similarity of the two names.

In the North American case, supra, the Ninth Circuit holds that plaintiff was entitled to the exclusive use of the term "North American" in the aviation industry. It certainly does not extend the exclusive use beyond the aviation industry. A casual examination of the Central Directory of the Los Angeles Telephone Exchange for June, 1956, indicates there are companies known as North American Accident Insurance Co., of Chicago, North American Car Corporation; North American Church Tenrikyo, North American Film Corporation, North American Industrial Engineers, Inc., et cetera. In fact, this directory gives the names of twenty-two companies using the words "North American" in their names. We cannot find in reading the North American Air Coach Systems, Inc., case, supra, that the Court held [73] plaintiff therein was entitled to the exclusive use of the name outside the aviation industry.

In the case at bar the Court is of the opinion plaintiff is entitled to protection of its name "Safeway" within the retail food and grocery industry in Southern California. The only question is whether defendant Safeway Furniture Co., Inc., comes within the area of protection. Although plaintiff and its predecessors have been using the name "Safeway" since 1925, nevertheless, over the years the name has been used many, many times in other businesses. In 1925 there was a "Safeway Cleaners

and Dyers"; in 1926 a "Safeway Auto Finance Co." and a "Safeway Loan Company." Since 1925 there have been approximately ninety-six listings with the County Clerk of Los Angeles County of fictitious or corporate names in which the name "Safeway" appears. An examination of the June, 1956, Central Directory of the Los Angeles Telephone Exchange indicates twenty firms now using the word "Safeway" in their titles.

Plaintiff contends there does not have to be competition between the parties. However, this Court is of the opinion that the statement made by the Ninth Circuit in the Phillips case, supra, has been modified by later decisions of that court. In Robert C. Wian Enterprises, Inc., v. Persinger, 229 F.2d 154 (in which this Court dismissed the complaint on the ground that it appeared from the records and files there was no competition between the parties) the Circuit reversed, stating:

> "* * * There seems to be little likelihood of confusion of identity of products, but upon a trial there may be some proof of confusion of source that entitled plaintiff to some relief * * *" [74]

In Fairway Foods v. Fairway Markets, 118 F. Supp. 840, a case tried by this Court, the judgment was sustained by the Circuit—227 F.2d 193—which said, at page 196:

> "The evidence without conflict supports the trial court's finding that there has been no con-

> fusion and that there is no likelihood of confusion because of the use by both parties of the word 'Fairway' * * * Perhaps the most important element of unfair trade is that there be competition in the sale of like merchandise and that there is, or is likelihood of, confusion as to which competitive article is being purchased * * *"

In the case at bar the Court is of the opinion there is no competition between the parties hereto of like merchandise; there has been no confusion between the parties' products, and there is little likelihood of confusion so long as plaintiff continues to operate retail food and grocery markets and defendant continues to operate a retail furniture store. We cannot agree with plaintiff that it is entitled to protection of the word "Safeway" in the entire retail business in Southern California. Its protection must be limited to the retail trade definitely connected and associated with sale of commodities usually found in a retail grocery and food store.

Judgment is ordered in favor of defendant herein, who is required to prepare findings of fact, conclusions of law and judgment in conformity herewith for presentation to the Court on or before June 29, 1956.

Dated: June 18th, 1956.

/s/ HARRY C. WESTOVER,
United States District Judge.

[Endorsed]: Filed June 18, 1956. [75]

[Title of District Court and Cause.]

## PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action, having duly come on for trial on May 24, 1956, before this Court, the Honorable Harry C. Westover, Judge Presiding; plaintiff appearing by Gibson, Dunn & Crutcher, by Norman S. Sterry; and defendants appearing by William B. Magid; and the cause having been continued for trial to May 25, 1956, before the same judge, and said cause having come to trial;

And the issues for trial having been joined upon the plaintiff complaint and amendment by interlineation to said complaint, the answer of all the named defendants; and the parties having stipulated to certain facts read into the record at the trial;

And the Court having heard and received evidence, both on the aforesaid complaint and on the answer thereto, including testimony of witnesses, the deposition of the defendant [76] Morris Rudner, exhibits and other evidence both oral and documentary;

And both sides having filed memoranda of law;

And the plaintiff, through its attorney, having moved to dismiss as to all fictitious parties and to dismiss without prejudice as to defendants Safeway Furniture Co., Inc., Rose Rudner and Gerald Rudner and said motion having been granted in open

Court and the defendants Does I through V, having been dismissed and the defendants Safeway Furniture Co., Inc., Rose Rudner and Gerald Rudner having been dismissed from said law suit without prejudice; and the cause having been submitted for decision; and the Court having under date of June 18, 1956, filed its Memorandum of Opinon ordering judgment for defendant Morris Rudner, and that Counsel for said defendant shall prepare findings of fact, conclusions of law and judgment in conformity with said memorandum of opinion for presentation to the court on or before June 29, 1956; and the Court being fully advised in the premises, makes its following

Findings of Fact

The Court finds that:

I.

It is true as alleged in Paragraph I of the complaint that plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Maryland.

II.

It is true that Morris Rudner is a citizen of the State of California as alleged in Paragraph IV of said complaint.

III.

It is true that plaintiffs and its predecessors and affiliated corporations have, since 1925 been engaged as owners and operators of a large chain of retail food and grocery stores selling groceries, meats,

vegetables, incidental notions, kitchen hardware, et cetera. [77]

IV.

It is true as alleged in Paragraph XIII of plaintiff's complaint that the name "Safeway" has attained a secondary meaning in the Southern California area as indicating a retail food and grocery store operated by the plaintiff organization.

V.

It is true as alleged in Paragraphs XIV through XX that plaintiff corporation has expended large sums of money in advertising throughout the United States, Canada and especially in the State of California and Southern California and that as a result thereof the plaintiff has built up a valuable good will.

VI.

It is true as alleged in Paragraph XXI of plaintiff's complaint that the name "Safeway" has become generally known to the public and has acquired a secondary meaning in Southern California including the area in which the defendant is located as a food and grocery store.

VII.

It is not true that any of the defendants other than the defendant Morris Rudner is now operating a retail furniture store in Van Nuys, California.

VIII.

It is not true as alleged in Paragraph XXVI that the individual defendants or the corporate defend-

ant intend to resume business of the retail sale of furniture under the name of Safeway Furniture Co., Inc.

IX.

It is not true as alleged in Paragraph XXVIII that the individual defendants adopted the name "Safeway Furniture Co." but rather that the said defendant Morris Rudner purchased an interest in a then existing furniture company know as Safeway Furniture Co.; nor is it true that the defendants used the name Safeway Furniture Co. for the fraudulent and illegal purpose of competing unfairly [78] with plaintiff and trading upon the name, goodwill and reputation established by plaintiff but it is true that the defendant continued conducting the business under the name of Safeway Furniture Co. because, to change the name, would entail considerable expense since it would be necessary to change neon and electric signs, stationery, painting, et cetera. It is not true that the defendant used the name Safeway with the intent and design to lead the public to believe that his store was or is sponsored by or connected with the plaintiff and it is not true that the defendant intended to or is trading upon the goodwill and high reputation and standing of the plaintiff.

X.

It is not true, as alleged in Paragraph XXIX that the advertising of the defendant was carried on in such a way as to convey the idea that sales made by said defendant were connected with and sponsored by the plaintiff.

XI.

It is not true, as alleged in Paragraph XXX of the complaint that the written advertising of the defendants was so printed as to cause the word Safeway to be the most prominent part of such advertising; it is not true that said name was so used and displayed for the purpose of trading upon the name, reputation and standing of plaintiff nor is it true that defendants' customers and the public were led to believe that the defendants' stores were in some way identified with and sponsored by the plaintiff.

XII.

It is not true, as alleged in Paragraph XXXII that the defendant's use of the name Safeway Furniture Co., caused or will cause the public to believe that the standards of plaintiff's business conduct and the quality of plaintiff's goods or services have fallen or will fall through any act of the defendant. [79]

XIII.

It is not true that the use of the name Safeway Furniture Co. by the defendant for the purpose of selling of furniture at retail has confused, or is likely to confuse the minds of the public between plaintiff's food and grocery stores and defendants' furniture store and it is not true that anyone has been misled because of the similarity of the two names.

XIV.

It is not true that there is any competition between the plaintiff, Safeway Stores, Inc., and the defendant doing business as Safeway Furniture Co.

On the Basis of the Foregoing Findings of Fact, the Court Reaches the Following

## Conclusions of Law

I.

The Court has jurisdiction of the controversy as joined by the complaint and the answer thereto in that the plaintiff is a citizen of a different state from the state of citizenship of the defendants and the matter in controversy exceeds in value the sum of $3,000, exclusive of interest and costs.

II.

Plaintiff has established a goodwill and secondary meaning for the name "Safeway" in the Southern California area as indicating a retail food and grocery store.

III.

As far as the buying public is concerned there is no confusion between the plaintiff's store and the defendants' store.

IV.

As far as the buying public is concerned there is no competition between the plaintiff and the defendants.

V.

As far as the buying public is concerned no one has been [80] misled because of the similarity of the name of the plaintiff and of the defendants' use of the name "Safeway Furniture Co."

VI.

Plaintiff has not been damaged by any of the acts, threatened acts or the use of the name Safeway Furniture Co. by the defendants.

VII.

Plaintiff is not entitled to an injunction against the defendants.

VIII.

Plaintiff is not entitled to any relief as against the defendants for unfair competition or at all.

IX.

Plaintiff is entitled to the protection of the word "Safeway" only insofar as it pertains to the retail trade definitely connected and associated with sale of commodities usually found in a retail grocery and food store.

X.

The Court hereby incorporates by reference in this paragraph, as a part of its findings of fact and conclusions of law, its memorandum of opinion dated June 18, 1956.

Based upon the foregoing Findings of Fact and Conclusions of Law the Court rendered its Judgment.

Dated this .... day of ....., 1956.

....,
Judge of the United States
District Court.

Lodged June 27, 1956. [81]

[Title of District Court and Cause.]

## OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW AND TO THE FORM OF THE JUDGMENT

Comes Now the plaintiff and within the time allowed by the Rules of the Court and as extended by Stipulation approved by the Court, files this, its Objections to the Findings of Fact and Conclusions of Law, heretofore served upon it and objects to the proposed Findings of Fact and Conclusions of Law and to the form of the Judgment. Its objection to the form of the Judgment is that the same is not in accordance with Rule 7 of this Court as amended on December 22, 1955.

While the plaintiff does not believe that the evidence justifies Findings IX to XIV, inclusive, the Findings, other than Finding XIII, as drawn are in conformity with the views expressed by the Court in its Opinion directing that Judgment be entered for defendant. Plaintiff's objections, however, to the preceding Findings I to VIII are that they are not adequate and do not find on a number of facts which are established by uncontradicted evidence. The Memorandum [84] Opinion of the Court directs a judgment for the defendant solely upon the ground that there was no direct competition between the plaintiff and the defendant and that the plaintiff, therefore, cannot prevent the defendant from using the name "Safeway" as part of its name or advertising under the name of "Safeway." We believe

the Court recognized at the trial that the question is one of very great importance, not only to this plaintiff but to all retail establishments, and that the plaintiff expects to take an appeal from the Decree of the Court as soon as that Decree is made and entered. It will save a great deal of labor to counsel for both parties in writing their briefs if the facts which are undisputed and upon which the plaintiff-appellant relies, are clearly set forth in the Findings so that all that is necessary is to refer to the Findings rather than quote or cite the evidence. With that thought in view, we suggest the following amendments or enlargements to the Findings:

I.

Insert after Finding II a Finding to be numbered III as follows:

> "That the action is between citizens of different States, to wit, the plaintiff a citizen of the State of Maryland and the defendant Morris Rudner a citizen of California. That the matter in controversy exceeds in value the sum of $3,000.00, exclusive of interest and costs."

Explanation: This is set out as the first Conclusion of Law, but plaintiff thinks it should be a direct Finding of Fact.

II.

We think Finding III should be redrafted (If the Court accepts our first suggestion, it will, of course, be numbered IV), as follows:

"It is true as alleged in said complaint that the plaintiff and its predecessors in interest [85] and affiliated corporations since 1925 have operated throughout California and in a large number of other States in the Union and in Canada a large chain of retail food and grocery stores in which it has sold groceries, meats, vegetables, incidental notions, kitchenware, furniture polish, floor wax and expendable items that are used in maintaining a house. In certain of its stores in Districts other than Los Angeles, plaintiff has sold various items of household furniture such as T.V. tables, hassocks, lawn chairs, dishes, glassware and other articles of tableware and other articles normally carried by the average furniture company, and plaintiff intends to extend the sale of such items to its stores in Los Angeles."

III.

Redraft Finding IV to read as follows:

"That in 1926 plaintiff adopted as a trade name the word 'Safeway' for use by itself and its affiliated companies. For a short period plaintiff advertised under both the name of 'Safeway' and 'Safeway Stores.' That at the time of filing this action and ever since and for at least ten years prior to the opening of defendant's store by defendant's predecessors in interest, plaintiff has advertised extensively under the name 'Safeway' and the word 'Safe-

way' has obtained a secondary meaning throughout the State of California, and especially in Southern California, as indicating the chain of stores operated by the plaintiff and the goods sold by it."

IV.

Add to Finding V: "of many millions of dollars." [86]

V.

We do not see the propriety of Finding VIII that the individual defendants and the corporate defendant do not intend to do business under the name of Safeway Furniture Co., Inc. The action was dismissed without prejudice as to all the defendants except Morris Rudner and as to Safeway Furniture Co., Inc. It does not seem to us appropriate, therefore, to have a Finding as to those defendants against whom the action is not now pending.

VI.

Redraft Conclusion of Law No. I as follows:

"The Court has jurisdiction of the above-entitled action."

All of the proposed enlargements of the Findings are in accordance with the undisputed evidence, and we therefore earnestly request that they be adopted by the Court.

VII.

We do not believe that Finding XIII is entirely in accord with the Memorandum of Opinion, and we suggest that if it be reworded as follows it will be

in strict accordance with the views of the Court expressed in its Opinion:

> "It is not true that the use of the name Safeway Furniture Co. by the defendant for the purpose of selling of furniture at retail has confused the minds of the public between plaintiff's food and grocery stores or any goods sold by plaintiff and defendant's furniture store and it is not true that anyone has been misled because of the similarity of the two names, and there is little likelihood of confusion so long as plaintiff continues to operate retail food and grocery markets and defendant continues to operate a retail furniture store." [87]

While we believe that all of the foregoing proposed additions to the Findings are in conformity with the undisputed evidence, and that Finding XIII is in strict conformity with the views expressed by the Court at the trial and in its Memorandum of Opinion, we think that it would be helpful to the Court to have a redraft of the Proposed Findings and Conclusions embodying our proposed additions to the Findings with the proposed change in Finding XIII. We would have had such redraft accompany these Objections to the defendant's proposed Findings except for the fact that the writer's return from an out-of-town trip was delayed two days longer than anticipated, with the result that we might not be able to get the redraft completed today, the 12th, which is our time limit to file the objections. We will, however, hand to the Court either

today or tomorrow such redraft of the Proposed Findings of Fact and Conclusions of Law. In doing so, we wish it understood that we are not proposing such findings but are simply preparing the redraft so that the Court can have before it in one complete document the Findings of Fact and Conclusions of Law proposed by the defendant with the additions, amendments and changes which we have suggested. We do not, of course, concede that any of the findings proposed by the defendant and incorporated into the redraft are supported by the evidence, or that the findings as proposed by the defendant or as set out in the redraft are sufficient or will sustain a judgment in favor of the defendant or that the findings in the redraft, other than those which are proposed by the plaintiff as amendments, are supported by or in accord with the evidence.

Respectfully submitted,

GIBSON, DUNN & CRUTCHER,
NORMAN S. STERRY,
HENRY F. PRINCE,
FREDERIC H. STURDY,
IRA C. POWERS,
JAMES R. HUTTER,
Of Counsel;

By /s/ NORMAN S. STERRY,
Attorneys for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed July 12, 1956. [88]

In the United States District Court, Southern District of California, Central Division

No. 17553—HW

SAFEWAY STORES, INCORPORATED,

Plaintiff,

vs.

SAFEWAY FURNITURE CO., INC., a Corporation, et al.,

Defendants.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

The above-entitled action, having duly come on for trial on May 24, 1956, before this Court, the Honorable Harry C. Westover, Judge Presiding; plaintiff appearing by Gibson, Dunn & Crutcher, by Norman S. Sterry; and defendants appearing by William B. Magid; and the cause having been continued for trial to May 25, 1956, before the same Judge, and said cause having come to trial;

And the issues for trial having been joined upon the plaintiff's complaint and amendment by interlineation to said complaint, the answer of all the named defendants; and the parties having stipulated to certain facts read into the record at the trial;

And the Court having heard and received evidence, both on the aforesaid complaint and on the answer thereto, including testimony of witnesses,

the deposition of the defendant Morris [90] Rudner, exhibits and other evidence both oral and documentary;

And both sides having filed memoranda of law;

And the plaintiff, through its attorney, having moved to dismiss as to all fictitious parties and to dismiss without prejudice as to defendants Safeway Furniture Co., Inc., Rose Rudner and Gerald Rudner and said motion having been granted in open Court and the defendants Does I through V, having been dismissed and the defendants Safeway Furniture Co., Inc., Rose Rudner and Gerald Rudner having been dismissed from said lawsuit without prejudice; and the cause having been submitted for decision; and the Court having under date of June 18, 1956, filed its Memorandum of Opinion ordering judgment for defendant Morris Rudner, and that counsel for said defendant shall prepare Findings of Fact, Conclusions of Law and Judgment in conformity with said memorandum of opinion for presentation to the Court on or before June 29, 1956; and the Court being fully advised in the premises, makes its following

Findings of Fact

The Court finds that:

I.

It is true as alleged in Paragraph I of the complaint that plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Maryland.

II.

It is true that Morris Rudner is a citizen of the State of California as alleged in Paragraph IV of said complaint.

III.

That the action is between citizens of different States, to wit, the plaintiff a citizen of the State of Maryland and the defendant Morris Rudner a citizen of California. That the matter in controversy exceeds in value the sum of $3,000.00 [91] exclusive of interests and costs.

IV.

It is true as alleged in said complaint that the plaintiff and its predecessors in interest and affiliated corporations since 1925 have operated throughout California and in a large number of other States in the Union and in Canada a large chain of retail food and grocery stores in which it has sold groceries, meats, vegetables, incidental notions, kitchenware, furniture polish, floor wax and expendable items that are used in maintaining a house. In certain of its stores in Districts other than Los Angeles, plaintiff has sold various items of household furniture such as T.V. tables, hassocks, lawn chairs, dishes, glassware and other articles of tableware.

V.

That in 1926 plaintiff adopted as a trade name the word "Safeway" for use by itself and its affiliated companies. For a short period plaintiff advertised under both the name of "Safeway" and "Safeway Stores." That at the time of filing this action and

ever since and for at least ten years prior to the opening of defendant's store by defendant's predecessors in interest, plaintiff has advertised extensively under the name "Safeway" and the word "Safeway" has obtained a secondary meaning throughout the State of California, and especially in Southern California, as indicating the chain of stores operated by the plaintiff.

VI.

It is true as alleged in Paragraphs XIV through XX that plaintiff corporation has expended large sums of money in advertising throughout the United States, Canada and especially in the State of California and Southern California and that as a result thereof the plaintiff has built up a valuable good will of many millions of dollars. [92]

VII.

It is true as alleged in Paragraph XXI of plaintiff's complaint that the name "Safeway" has become generally known to the public and has acquired a secondary meaning in Southern California including the area in which the defendant is located as indicating a chain of food stores operated by plaintiff.

VIII.

It is not true that any of the defendants other than the defendant Morris Rudner is now operating a retail furniture store in Van Nuys, California.

IX.

It is not true as alleged in Paragraph XXVIII that the individual defendants adopted the name

"Safeway Furniture Co." but rather that the said defendant Morris Rudner purchased an interest in a then existing furniture company known as Safeway Furniture Co.; nor is it true that the defendants used the name Safeway Furniture Co. for the fraudulent and illegal purpose of competing unfairly with plaintiff and trading upon the name, good will and reputation established by plaintiff, but it is true that the defendant continued conducting the business under the name of Safeway Furniture Co. because, to change the name, would entail considerable expense since it would be necessary to change neon and electric signs, stationery, painting, et cetera. It is not true that the defendant used the name Safeway with the intent and design to lead the public to believe that his store was or is sponsored by or connected with the plaintiff and it is not true that the defendant intended to or is trading upon the good will and high reputation and standing of the plaintiff.

X.

It is not true, as alleged in Paragraph XXIX that the advertising of the defendant was carried on in such a way as to convey the idea that sales made by said defendant were connected [93] with and sponsored by the plaintiff.

XI.

It is not true, as alleged in Paragraph XXX of the complaint that the written advertising of the defendants was so printed as to cause the word Safeway to be the most prominent part of such advertis-

ing; it is not true that said name was so used and displayed for the purpose of trading upon the name, reputation and standing of plaintiff nor is it true that defendants' customers and the public were led to believe that the defendants' stores were in some way identified with and sponsored by the plaintiff.

XII.

It is not true, as alleged in Paragraph XXXII that the defendants' use of the name Safeway Furniture Co. caused or will cause the public to believe that the standards of plaintiff's business conduct and the quality of plaintiff's goods or services have fallen or will fall through any act of the defendant.

XIII.

It is not true that the use of the name Safeway Furniture Co. by the defendant for the purpose of selling of furniture at retail has confused the minds of the public between plaintiff's food and grocery stores or any goods sold by plaintiff and defendants' furniture store and it is not true that anyone has been misled because of the similarity of the two names, and there is little likelihood of confusion so long as plaintiff continues to operate retail food and grocery markets and defendant continues to operate a retail furniture store.

XIV.

It is not true that there is any competition between the plaintiff Safeway Stores, Incorporated and the defendant doing business as Safeway Furniture Co.

On the Basis of the Foregoing Findings of Fact, the [94] Court Reaches the Following

Conclusions of Law

I.

The Court has jurisdiction of the above-entitled action.

II.

Plaintiff has established a good will and secondary meaning for the name "Safeway" in the Southern California area as indicating a retail food and grocery store.

III.

As far as the buying public is concerned, there is no confusion between the plaintiff's store and the defendants' store.

IV.

As far as the buying public is concerned, there is no competition between the plaintiff and the defendants.

V.

As far as the buying public is concerned, no one has been misled because of the similarity of the name of the plaintiff and of the defendants' use of the name "Safeway Furniture Co."

VI.

Plaintiff has not been damaged by any of the acts, threatened acts or the use of the name Safeway Furniture Co. by the defendants.

VII.

Plaintiff is not entitled to an injunction against the defendants.

VIII.

Plaintiff is not entitled to any relief as against the defendants for unfair competition or at all.

IX.

Plaintiff is entitled to the protection of the word "Safeway" only insofar as it pertains to the retail trade definitely [95] connected and associated with sale of commodities usually found in a retail grocery and food store.

X.

The Court hereby incorporates by reference in this paragraph, as a part of its Findings of Fact and Conclusions of Law, its Memorandum of Opinion dated June 18, 1956.

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged and Decreed that:

I.

Plaintiff shall take nothing by its complaint, or at all.

II.

Defendants and each of them shall recover from plaintiff and plaintiff is ordered to pay, the costs of defendants in the sum of $.....

III.

The Clerk is directed to enter the foregoing Judgment.

Dated: This 24th day of July, 1956.

/s/ HARRY C. WESTOVER,
Judge of the United States
District Court.

It Is Stipulated that the foregoing Findings of Fact and Conclusions of Law and Judgment are approved by both parties as to form and are a true and correct transcription of the Findings of Fact and Conclusions of Law as directed by the Court after hearing arguments on the objections of plaintiff to the proposed [96] Findings of Fact and Conclusions of Law drafted by defendant.

Dated: July 24, 1956.

NORMAN S. STERRY,
HENRY F. PRINCE,
FREDERIC H. STURDY,
IRA C. POWERS,
JAMES R. HUTTER,
GIBSON, DUNN & CRUTCHER,

By /s/ NORMAN S. STERRY,
Attorneys for Plaintiff Safeway Stores, Incorporated.

/s/ WM. B. MAGID,
Attorney for Defendants.

[Endorsed]: Filed July 24, 1956.

Docketed and entered July 24, 1956. [97]

[Title of District Court and Cause.]

## NOTICE OF APPEAL

Notice Is Hereby Given that the plaintiff above-named hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment of the above-entitled Honorable United States District Court, Southern District of California, Central Division, entered and docketed in this action on July 24th, 1956, and from the whole of said Judgment.

Dated this 13th day of August, 1956.

NORMAN S. STERRY,
HENRY F. PRINCE,
FREDERIC H. STURDY,
IRA C. POWERS,
JAMES R. HUTTER,
GIBSON, DUNN & CRUTCHER,

By /s/ NORMAN S. STERRY,
Attorneys for Plaintiff Safeway Stores, Incorporated.

Affidavit of service by mail attached.

[Endorsed]: Filed August 13, 1956. [98]

[Title of District Court and Cause.]

## PETITION FOR AND EX PARTE ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL AND DOCKETING THE APPEAL

Whereas Notice of Appeal in the above-entitled matter was filed on behalf of plaintiff on August 13, 1956;

Whereas on the same date an undertaking for cost bond on appeal was filed;

Whereas on August 16, 1956, a Designation of Contents of Record upon Appeal was filed on behalf of plaintiff;

Whereas the forty day period within which the record on appeal must be filed with the Appellate Court and the appeal there docketed expires on September 22, 1956, under Rule 73(g) of the Federal Rules of Civil Procedure.

Whereas the clerk's office of this United States District Court has advised Counsel's Office that he may be unable to complete the record on appeal and file the same and docket the same with the Appellate Court by said date of September 22, 1956;

Now Therefore, it is respectfully petitioned that this honorable court extend the time within which the record on appeal may be filed with the Appellate Court and the appeal there docketed for an additional period of 10 days.

Dated: September 21, 1956.

NORMAN S. STERRY,
HENRY F. PRINCE,
FREDERIC H. STURDY,
IRA C. POWERS,
JAMES R. HUTTER,
GIBSON, DUNN & CRUTCHER,

By /s/ NORMAN S. STERRY,
Attorneys for Plaintiff-Appellant Safeway Stores, Incorporated.

Pursuant to Rule 73(g) of the Federal Rules of Civil Procedure, it is hereby ordered that the period within which the record on appeal in the above matter may be filed with the Appellate Court and the appeal there docketed shall be extended for an additional period of 10 days in addition to the 40 day period provided in said Rule 73(g).

Dated: September 21, 1956.

/s/ HARRY C. WESTOVER,
Judge, United States District Court.

[Endorsed]: Filed September 21, 1956.

In the United States District Court, Southern District of California, Central Division

No. 17553—HW Civil

SAFEWAY STORES, INCORPORATED,

Plaintiff,

vs.

SAFEWAY FURNITURE CO., INC., a Corporation, et al.,

Defendants.

Honorable Harry C. Westover, Judge Presiding.

Thursday, May 24, 1956

Appearances:

For the Plaintiff:
GIBSON, DUNN & CRUTCHER, by
NORMAN S. STERRY, ESQ., and
M. E. WHALEN, ESQ.

For the Defendants:
WILLIAM B. MAGID, ESQ.

Thursday, May 24, 1956—2:00 P.M.

The Clerk: No. 17553—HW Civil, Safeway Stores, Incorporated, vs. Safeway Furniture Co., Inc., et al., trial.

Mr. Sterry: Ready for the plaintiff.

Mr. Magid: Ready for the defendant, your Honor.

The Court: I have read your pleadings and your stipulation, and so you can call your first witness.

Mr. Sterry: If your Honor please, in this case I am doing nothing I haven't done in any case. I always prepare a trial brief, which has no argument, simply the rules that are relied on, and a digest and quotation of cases supporting those rules. I have sent a copy to Mr. Magid, and I am handing a copy to your Honor.

The Court: I would be happy to read it.

Mr. Sterry: I don't mean that your Honor should read it because many of the questions may not arise, but that is always my custom.

If your Honor please, because of not getting to trial on Monday, and I trust your Honor will not consider that I had the slightest criticism of the court for that, because I have been around too long to think that you can control that, but some of my witnesses have made other arrangements, so I will have to put them on a little out of order.

The Court: That is perfectly all right with me. [3*]

Mr. Sterry: Mr. Bauer.

## ROBERT J. BAUER

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Robert J. Bauer, B-a-u-e-r.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Robert J. Bauer.)

Mr. Sterry: Before I examine the witness, I want to dismiss as to the fictitious defendants.

The Court: They may be dismissed.

Mr. Sterry: And if Mr. Rudner testifies to the same facts that he has in his deposition, I shall probably move to dismiss as to all other defendants without prejudice, but I want to withhold that motion until we have Mr. Rudner's testimony.

The Court: The fictitious defendants may be dismissed.

Direct Examination

By Mr. Sterry:

Q. Mr. Bauer, state your name, please, for the reporter. A. Robert J. Bauer.

Q. Where do you live, Mr. Bauer? [4]

A. 10995 Robling.

Q. In Los Angeles? A. Yes.

Q. Mr. Bauer, where is your place of business?

A. 724 South Spring Street.

Q. Mr. Bauer, are you connected with any organization?

A. I am president of the Better Business Bureau.

Q. I have no doubt that the court knows generally, Mr. Bauer, what that is. Will you keep your voice up just a little bit, Mr. Bauer?

A. Sure.

Q. I have no doubt that the court knows of the——

(Testimony of Robert J. Bauer.)

The Court: Yes, I know the Better Business Bureau and what they are trying to do.

Mr. Sterry: For the record, your Honor, I would like just as briefly as possible to have it.

Q. Just state generally what the function of that bureau is.

A. It is to promote truth in advertising and to fight commercial fraud.

Q. It is a non-profit corporation?

A. Yes, non-profit corporation, maintained in Los Angeles by about 2,300 business firms.

Q. Of all varieties? A. Yes. [5]

Q. Retail and wholesale?

A. Retail, wholesale.

Q. Financial? A. Yes.

Mr. Magid: If your Honor please, of course, this is not too important, but I object to Mr. Sterry's testifying unless he takes the witness stand.

The Court: There is no question about what the Better Business Bureau does. I don't know if it has anything to do with this case or not.

Mr. Sterry: If your Honor please, it simply qualifies the witness. I have to make a record here.

The Court: Well, you go ahead. Proceed.

Q. (By Mr. Sterry): Mr. Bauer, how long have you been connected with the Better Business Bureau Association?

A. I have been the executive head of this Bureau since 1930. Prior to that I was with the Detroit Better Business Bureau.

(Testimony of Robert J. Bauer.)

Q. How long have you been president of it?

A. I have been president for about six years.

Mr. Sterry: Counsel, speaking about leading, I was simply trying to get through as shortly as I could.

Q. You say it is in everything. How do you do this? Is it on complaints of people or on your own or what?

Mr. Magid: If your Honor please, the defendant objects [6] to Mr. Sterry leading the witness.

The Court: Overruled.

The Witness: The Better Business Bureau investigates advertising and selling claims on its own, and also as a result of complaints received from the public and from competitive business firms.

Q. (By Mr. Sterry): As president of that, do you have to keep in touch with the general way and method of conduct of retail and wholesale businesses? A. Yes, we do.

Q. And the general trend of advertising?

A. Yes.

Q. General effect on the public?

A. That's right.

Q. Now, I don't know whether my client, Safeway Stores, Incorporated, is a member of that bureau or not. Is it? A. It is.

Q. Do you know whether the defendant, Safeway Furniture Company in Van Nuys, is?

A. I think it is not, but frankly I didn't check. I am pretty sure they are not.

Mr. Sterry: May we have a stipulation, counsel,

(Testimony of Robert J. Bauer.)

that as long as the two firms have the word Safeway, that I may refer to the plaintiff as Stores, Incorporated, and your company as the defendant, and it will be so understood, unless [7] we want to make it more specific.

Mr. Magid: Why not refer to them as plaintiff and defendant, or as Stores and Furniture, and then we will know exactly what we are talking about.

Q. (By Mr. Sterry): Have you any personal interest yourself in the result of the outcome of this lawsuit? A. I have not.

Q. Do you know of your own knowledge, confining it to this vicinity, Los Angeles County, whether the plaintiff, Stores, Incorporated, has used any one word or insignia as advertising?

A. I know for many years their signature on their advertising has been just simply Safeway.

The Court: Isn't that in the stipulation? That is in your stipulation. You don't have to prove anything you stipulated to, do you?

Mr. Sterry: No, but counsel has asked us to stipulate. It is not in the record. I think from conversations that he intends to prove there are a number of other concerns that use the word Safeway in their firm name.

Q. In all your business or transactions, have you ever known of any other concern than the plaintiff that has been known by that single word, Safeway?

A. Not that I recall, although I know the name

(Testimony of Robert J. Bauer.)

Safeway has been used in a few instances, but I know none where it [8] has been used by a retail store here.

Q. In all your experience, do you know of any other concern that has attempted to advertise as Safeway? A. No.

Mr. Sterry: Now, I think the advertisement in the papers speaks for itself, but I will not ask counsel to stipulate, because we can prove it.

The Court: If you are going to use that, have it marked for identification.

Mr. Sterry: Yes, if your Honor please.

The Court: It may be marked Plaintiff's Exhibit 1 for identification.

The Clerk: Exhibit 1 for identification.

(The exhibit referred to was marked Plaintiff's Exhibit No. 1 for identification.)

The Court: The chances are, if you will show those newspapers to opposing counsel, he will stipulate that is an ad put in the newspaper on that date by the plaintiff.

Mr. Sterry: As your Honor suggests, I will show these three and ask counsel if he will so stipulate.

The Court: A newspaper ad speaks for itself. They have got the ad there and the date. I don't know why you can't stipulate that appears in the newspaper.

Mr. Sterry: If your Honor please, I believe it is admissible without identification, but as I can

(Testimony of Robert J. Bauer.)

prove it is, [9] if they don't admit it, I never try to argue law points.

The Court: Just be quiet and they will admit. Counsel, won't you stipulate?

Mr. Magid: Certainly, your Honor. I will be glad to.

The Court: That's what I thought.

Mr. Magid: I am under the impression that you are just offering the three top sheets. Is that correct, Mr. Sterry? Or shall we go into all of these?

Mr. Sterry: I am offering the top sheet with the advertisement of your client. In each of these, I also believe an advertisement of the plaintiff can also be admitted.

Mr. Magid: That is the question I am asking, whether you want us to stipulate to anything else other than the top three sheets.

Mr. Sterry: I don't care. I want it stipulated that the advertisements of the plaintiff——

The Court: Counsel, all we are trying to do is ascertain the facts. We are not trying lawsuits on any technical advantage either party can get. If those advertisements were placed in the newspaper, that is the newspaper, and you have got the date, and the heading of the newspaper. I don't know why you can't stipulate.

Mr. Magid: I think, your Honor, the question is different. There are many pages that Mr. Sterry is presenting. [10]

The Court: All right. Look at all of them.

Mr. Magid: Some of them deal with the plain-

(Testimony of Robert J. Bauer.)

tiff. Some of them deal with the defendant. Some of them deal with neither one of them.

The Court: If they don't deal with either one of you, it doesn't make any difference.

Mr. Magid: The only question I am asking Mr. Sterry is whether he has reference to the three top pages, which we stipulate were and now are advertisements placed by or on behalf of the defendant on the dates set forth in these three top pages.

Mr. Sterry: I intend to offer the advertisements of your client and the advertisements of mine in those two papers, and the rest of the paper I don't think is material.

The Court: Why can't you stipulate?

Mr. Magid: So stipulated.

The Court: All right. They may be received in evidence as Plaintiff's Exhibits 1, 2 and 3. Will you please put them in chronological order?

Mr. Sterry: Yes, if your Honor please. August 5, 1954. I hand the clerk for Exhibit 1, September 3, 1951.

The Clerk: Exhibit 1.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 1.)

Mr. Sterry: And the next is July 22, 1954. [11]

The Clerk: Exhibit 2.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 2.)

Mr. Sterry: I have the next, August 5, 1954, and

(Testimony of Robert J. Bauer.)

I think that should be the West Valley Publishing Company.

The Court: It speaks for itself. It has got a heading on it.

The Clerk: Exhibit 3.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 3.)

Mr. Whalen: Each states there what it is. This is the Reseda Sun, published by the West Valley Publishing Company, except this one is the San Fernando Sun.

Mr. Sterry: When you say "this one," it is Exhibit 1.

Mr. Whalen: Exhibit 1, and Exhibit 2 is the Reseda Sun edition of July 22, 1954, and Exhibit 3 is likewise the Reseda Sun, dated August 5, 1954.

Q. (By Mr. Sterry): Now, Mr. Bauer, I will ask you just to look at those three, and as soon as you have examined them, I want to ask you a question or two about them.

A. (Witness complying.) All right.

Q. Now, Mr. Bauer, I would ask you whether or not in your opinion, from your studying of the advertisements and advertising, those three advertisements of the defendant in this [12] case would or would not cause damage to the plaintiff.

Mr. Magid: That is objected to.

The Court: Sustained. You can't prove damage in that way, Mr. Sterry. You have an advertising man here.

(Testimony of Robert J. Bauer.)

Mr. Sterry: If it is monetary damage, that is not what I intended. I intended to show—perhaps my question is clumsy—that it would be very apt to result in confusion to people even who weren't confused by the advertising.

The Court: You may be able to produce witnesses who can come in here and say they have been confused by this advertising, but you have got here an executive, a man who is head of the Better Business Bureau, and he can't say in his opinion people would be confused.

Mr. Sterry: If your Honor please, let me state what I expect to prove by him, and then if your Honor rules that I can't prove it, why, I shall have to bow to your Honor's ruling.

I want to show by him that he is qualified, first, as an expert, he has been studying advertising, has been studying those things, that even assuming that a person was not confused by the advertising, that it would nevertheless have a tendency to cause confusion to the buying public in that if anybody patronized this store, and it was generally known as Safeway Furniture, and they stated, for instance, that they were dissatisfied with any deal, if they stated they [13] got gypped or were dissatisfied with the deal at Safeway, that that would redound, would be detrimental to the plaintiff. Now that, I believe, is the subject of expert testimony.

The Court: If you are making that as an offer of proof, it is rejected.

Mr. Sterry: Very well. Then I think there is no

(Testimony of Robert J. Bauer.)

need of my asking any further questions. That is what I expect to prove.

The Court: I think that is a question for the court to decide, whether or not there is any confusion, whether or not it would have a tendency to confuse the public.

Mr. Sterry: If your Honor please, many of the authorities point out it is almost impossible to find actual confusion at the consumer level. I don't know how many people, and you don't know, who go there, or anything else.

The Court: Well, it has been done in this courtroom.

Mr. Sterry: But it is not always possible to do it, and I think that we have a right to show that that character of advertisement is apt to be confusing. Now, if your Honor is taking a different view, I shall simply have to bow to it. I told your Honor frankly why I called the witness.

The Court: I am going to have to reject your offer of proof.

Mr. Sterry: I have only one more question then, if [14] your Honor please.

Q. Mr. Bauer, can you state of your own knowledge whether or not in this community the word Safeway denotes the plaintiff?

A. I think Safeway is a household word here, meaning most people would consider it the Safeway Stores that they were talking about.

Mr. Magid: If your Honor please, I move to strike that as not responsive to the question.

(Testimony of Robert J. Bauer.)

The Court: It may go out.

Mr. Sterry: Will you read my question, please?

The Court: Read the question.

(Question read.)

The Court: You can answer that yes or no.

The Witness: Yes.

Mr. Sterry: May I have the question read again?

(Question reread.)

The Court: I think his answer was an opinion. You haven't asked for an opinion.

Mr. Sterry: I thought I had asked him.

Q. What is your opinion?

Mr. Magid: That is objected to, if your Honor please, as incompetent, irrelevant and immaterial, what this man's opinion is as to the question asked.

The Court: Overruled. You may answer. [15]

The Witness: If anyone came to me and said——

The Court: No.

The Witness: All right. If they referred to Safeway——

The Court: Read the question. The question is, do you have an opinion? What is your opinion?

The Witness: My opinion is that when reference is made to Safeway, the average customer in this community would think of Safeway Stores.

Mr. Sterry: That's all.

The Court: Any questions?

(Testimony of Robert J. Bauer.)

Mr. Sterry: If your Honor please, at the suggestion of Mr. Whelan and your Honor, he had only answered that he had an opinion, and it indicates how often you are fooled when you read the record and you find out you haven't proved what you thought you had.

Q. By that you mean the plaintiff in this action? A. Yes.

Mr. Sterry: That's all.

Cross-Examination

By Mr. Magid:

Q. Mr. Bauer, you have taken a sampling or poll——

The Court: May I suggest that in the federal court we use the lectern, and I would appreciate it if you would use [16] the lectern, according to the rules.

Mr. Magid: I'm sorry.

Q. Mr. Bauer, you have or your organization has taken a sampling or a poll of the so-called average public in connection with this question?

A. We have not, no.

Q. You have not? A. No.

Q. Have you personally discussed this matter with, say, a hundred of the so-called public?

A. No. But through the years——

Q. Have you——

Mr. Sterry: Wait a minute. Let him answer.

The Court: Just a minute now. We have got a

(Testimony of Robert J. Bauer.)

reporter here and we have three of you going at one time. He can't take three of you. He has a right to answer the question, and if he answers, he has a right to explain his answer, and so don't break in. Now, let's go back and get his answer.

The Witness: Through the years we have had many communications by telephone of one kind or another from business firms and the public where they referred to Safeway, and in each case it would be Safeway Stores, Incorporated, that was referred to. That is on what I base my opinion.

Q. (By Mr. Magid): That goes for complaints, as well as [17] requests for information?

A. For any purpose, yes.

Q. Did you perchance bring with you a record of the complaints that you have received against Safeway Stores? A. I did not.

Mr. Magid: I have no further questions.

The Court: I take it, your opinion is a personal opinion?

The Witness: Certainly, from my business experience.

The Court: A personal opinion.

Mr. Magid: I have no further questions, your Honor.

The Court: You may step down.

(Witness excused.)

ROBERT M. SAMPLE

called as a witness herein by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you take the stand and state your name, please?

The Witness: Robert M. Sample.

The Clerk: Will you spell your last name?

The Witness: S-a-m-p-l-e. [18]

Direct Examination

By Mr. Sterry:

Q. Mr. Sample, where do you reside?

A. At 13120 Nimrod Place.

Q. Is that in the city of Los Angeles?

A. Yes, sir.

Q. And what is your business or occupation

A. I am vice president of the Better Business Bureau.

Q. That is the same organization that Mr. Bauer is president of? A. It is.

Q. How long have you been associated with that? A. 25 years.

Q. You have heard the testimony as to the character of the work done by that Bureau. Would you have any change to make in that testimony?

A. None whatever.

Q. Have you personally, during the 25 years, followed practically the same lines of endeavor with reference to occupation that Mr. Bauer testified to?

A. That is correct.

(Testimony of Robert M. Sample.)

Mr. Magid: May I interrupt the court and at this time ask that all witnesses other than the one testifying be excluded from the courtroom?

The Court: Denied. [19]

Q. (By Mr. Sterry): Mr. Sample, I will ask you a question, and this is for a yes or no answer. It is not or it is.

Have you an opinion formed not only from your discussions personally with many people, but also in your operation of your Bureau, your business discussions, as to whether or not the word Safeway has come to have a certain definite meaning to the general public?

Mr. Magid: Just a minute, please. We will object to that, if your Honor please, as assuming facts not in evidence.

The Court: Overruled.

The Witness: Yes.

Q. (By Mr. Sterry): What is that opinion?

A. My belief is that Safeway means to the average individual that it is a retail store of one kind or another, particularly the food field.

The Court: I think that can go out. The question is not what it means to the average individual.

The Witness: All right. It means to me, sir.

The Court: Read the question.

(Question read.)

The Court: Now, give your opinion and not what it means to other people.

(Testimony of Robert M. Sample.)

The Witness: Your Honor, may I ask a question?

The Court: No. You can answer that. What is your [20] opinion?

The Witness: The question referred to my experience with other people over the years.

Q. (By Mr. Sterry): The question is from all your conversations in business and your business dealings and everything else, have you an opinion as to whether the word Safeway means anything to the general public?

Mr. Magid: Your Honor please, again we will object on the specific ground that there is no testimony by this witness that he has ever had conversations, and again it is assuming facts not in evidence.

The Court: Supposing I go home tonight and my wife says, "I am going down to the Safeway"? What does she mean?

Mr. Magid: Then you have had a discussion.

The Court: Not necessarily. This man has an opinion. I will allow him to give his own opinion. I won't allow him to give the opinion of anybody else.

Mr. Magid: But the question is asked, if the reporter will be good enough to read it, I think the court will see that part of the question to which I am objecting.

The Court: You can give your opinion. Objection overruled. Give your opinion.

(Testimony of Robert M. Sample.)

The Witness: My opinion is that Safeway means retail store, particularly in the food field.

Q. (By Mr. Sterry): Anyone, or the stores operated by [21] the plaintiff? A. That's right.

Q. Counsel objected to the fact that you had not testified to having a conversation with anybody except in business. Eliminating anything that you have heard in your business conversations, have you ever heard, not once, but many times, the word Safeway used by other people not in business, when you go home or with your friends?

A. I have.

Mr. Sterry: No further questions.

The Court: Cross-examine.

Mr. Sterry: If your Honor please, I am very sorry, but I forgot to take the stand. It was inadvertence.

The Court: We have a different procedure than in the Superior Court. We find that if counsel will use the lectern, they will speak louder.

Mr. Sterry: Your Honor, I have no criticism of that. I am merely apologizing for overlooking your Honor's request. It was not through any intention of doing it.

The Court: All right.

(Testimony of Robert M. Sample.)

Cross-Examination

By Mr. Magid:

Q. Mr. Sample, I have placed before you Plaintiff's Exhibit No. 3, and ask you whether in your opinion that advertisement [22] refers to the Safeway Stores, which I believe you characterized as a retail grocery store.

Mr. Sterry: If your Honor please, I am perfectly willing to throw the examination wide open to both parties as to what the opinion of this witness is as to the effect of that, but when I asked him what its effect was and told your Honor the effect, you sustained the objection and held it was a matter for the court. On that same ground, I am going to object unless the defendant will stipulate there will be no objection to my propounding the questions I propounded to Mr. Bauer.

The Court: I think the advertisement speaks for itself.

Q. (By Mr. Magid): Mr. Sample, have you had discussions with the so-called average public or common man with respect to their belief in the name Safeway as it applies to the plaintiff and to the plaintiff only? In other words, have you taken, either personally or your Bureau, a sampling or a public opinion poll on this question?

A. I have not.

Mr. Magid: I have no further questions, your Honor.

Mr. Sterry: That's all.

The Court: You may step down. May this witness be excused?

Mr. Magid: He may, your Honor. [23]

The Court: You may be excused.

(Witness excused.)

FRANK DENNEY

called as a witness herein by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Frank Denney.

The Clerk: How do you spell your last name?

The Witness: D-e-n-n-e-y.

Direct Examination

By Mr. Sterry:

Q. Mr. Denney, where do you reside?

A. I live at 10 De Sablo Road, San Mateo, California.

Q. Will you tell the court if you are connected with the plaintiff, Safeway Stores, Incorporated?

A. Yes, I am.

Q. In what way or manner?

A. I am manager of Madison Buyers, which is a division of Salem Commodities, Inc., which in turn is a wholly-owned subsidiary of Safeway Stores, Incorporated.

Q. What is the function of the Commodities Company?

(Testimony of Frank Denney.)

A. The function of Salem Commodities is both manufacturing [24] and purchasing.

Q. Goods for sale by——

A. By Safeway Stores.

Q. You say Madison Buyers is a division of that. What is the function of Madison Buyers, or, rather, I will put it this way, what is your function as manager of Madison Buyers?

A. I oversee all of the purchasing of non-food commodities that are handled by Safeway Stores.

The Court: May I ask a question? You say non-food commodities?

The Witness: Yes, sir.

The Court: Does the Safeway Stores handle furniture?

The Witness: Yes, Safeway Stores does.

The Court: What kind of furniture?

The Witness: We handle such things as lawn chairs, hassocks, TV tables—just a whole host of products that would fall under the furniture classification.

The Court: You don't handle all kinds of furniture? You don't handle bedroom sets, dining room tables?

The Witness: We handle certain types of tables, your Honor, patio tables, for example.

The Court: You handle outdoor furniture?

The Witness: Yes, we do.

The Court: Do you handle indoor furniture?

The Witness: A hassock would be considered an

(Testimony of Frank Denney.)

indoor [25] piece of furniture. We have handled probably 50 carloads of hassocks.

The Court: What is a hassock? What do you mean by the term hassock?

The Witness: A hassock is a—it might be termed a footstool. It is used in any number of ways in a living room. People sit on them in front of a TV set, or put their feet on them.

The Court: You have TV tables and hassocks. What else do you have?

The Witness: Mr. Sterry, could I have that list?

Mr. Sterry: Oh, certainly.

The Witness: I could be more specific with that, then.

Mr. Sterry: I will give counsel for defendant a copy of the list.

The Court: I understand you are a buying organization?

The Witness: Yes, your Honor.

The Court: Buying for Safeway Stores?

The Witness: Yes, sir.

The Court: You buy for the local Safeway Stores?

The Witness: We buy for the local division just as we buy for 20 other Safeway divisions.

The Court: This furniture you are talking about is [26] sold in the local Safeway stores?

The Witness: We have some furniture that has been sold in the local Safeway stores.

The Court: I am interested in what is happen-

(Testimony of Frank Denney.)

ing in Los Angeles. I am not interested in New England and Canada. What have you done in Los Angeles?

Mr. Sterry: If your Honor please, may I make a statement so that you can understand the situation?

The Court: Yes.

Mr. Sterry: I am not stating evidence but I am stating what I am certain we can prove. The Safeway organization is by divisions, and the division manager is to a very large extent the arbiter of what they have and what they sell. Now, there are certain items of furniture, such as brooms and mops and some tables, that are sold in all divisions. There are other items that have not been sold in some divisions and some that are.

The Court: Do you consider a mop or broom furniture? That is an accessory, isn't it? Drug stores sell mops and brooms. They are not furniture stores.

Mr. Sterry: That is quite true, but I want your Honor to get the situation. The articles of furniture that Madison Buyers have been buying have not been up to date handled by the Los Angeles division, except in a very limited quantity. We can prove, if your Honor permits us, that the [27] division manager has been changed, and the present manager plans to sell all of these items, but up to date there has been such a negligible amount of them that if any right depended on what we

(Testimony of Frank Denney.)

have done to date, I would not make any claim, if I make myself clear on that.

Mr. Magid: We, of course, will object to any such offer of proof, as to what they plan to do.

The Court: It is not an offer of proof.

Mr. Magid: That is the only way I could interpret his statement, if it is at all pertinent.

Mr. Sterry: The court seemed a little confused.

The Court: I was going to say, Mr. Sterry, out where I live Safeway has put in an unusually large store, in fact, one of the largest I know of, but I haven't seen any furniture. But I am going back there tonight and see if I see any.

Mr. Sterry: You will not see any furniture.

The Court: I won't?

Mr. Sterry: So that we can get it before your Honor, I will make this offer. I offer to prove by this witness, and I can't prove everything by one witness, that since 1954 Safeway in various divisions has been selling a large quantity of items of furniture. I have handed counsel a list of them. Your Honor can look at that list without admitting it in evidence and see what its character is. It has been sold [28] in nearly all divisions except Los Angeles. Los Angeles has up to date not handled that. The new manager of the division has planned when he came here to offer that for sale. I think we have a right to do that.

We sell household articles, and many of the cases in the brief, if your Honor will look at them, refer to the very fact that to allow somebody who is not

(Testimony of Frank Denney.)

at the present moment competing with us to use our name would be to unduly restrain us in our power of enlargement of trade. There are quite a number of cases to that effect in there. In fact, there is one in the Ninth Circuit——

The Court: You go ahead, Mr. Sterry, and make your proof. Whether or not it is material or whether or not it will have anything to do with this case, I don't know.

Mr. Magid: If your Honor please, the defendant will be most happy to have Mr. Sterry present this for an exhibit. We will have no objection to it going into evidence.

Mr. Sterry: All right. Would your Honor care to have a copy of it before you?

The Court: If you are going to put it in evidence, I will have the original. It may be admitted in evidence as Plaintiff's Exhibit 4.

The Clerk: Exhibit 4.

(The exhibit referred to was received in evidence and marked as Plaintiff's Exhibit No. 4.) [29]

The Court: This list has been marked Exhibit 4. I assume the names over here are the names of cities in which Safeway Stores are located?

The Witness: Those are the names of the divisions, your Honor. By coincidence, they are cities, too, but they are the names of divisions to which we sold.

The Court: This shows the furniture you have

(Testimony of Frank Denney.)

sold through the various Safeway stores, and the furniture that the various Safeway stores have sold to the general public, is that right?

The Witness: That's right.

The Court: In Los Angeles we have got step stools?

The Witness: That happened to be the first one. We went back in our records to 1952, January. The first that was available from what we could see with a reasonable search was this, and then we proceeded from that point until March of 1956.

The Court: Let's see if we can find any other Los Angeles items.

Mr. Sterry: Your Honor, I will hand this to the witness.

The Court: Yes.

Mr. Sterry: I think there are none.

The Court: The only thing that has been sold in the Los Angeles division has been step stools, is that correct? [30]

The Witness: That is according to the records of Madison Buyers. I am not responsible for maintaining the records of the Los Angeles division. I am not aware of what the Los Angeles division itself may have purchased, not through our organization.

The Court: We can put it this way: This is the only item you know about?

The Witness: That is correct.

Mr. Sterry: Your Honor, as I have indicated before, I do not claim that there was any great

(Testimony of Frank Denney.)

amount of furniture of this kind sold by the Los Angeles division up to date. You have here in Exhibit 4, on the next to the second column from the right-hand side under quantity, you have a dollar sign, and that was inadvertent.

The Witness: Yes. That was a typographical error. That means 75 step stools or 210 TV trays. It does not mean dollars.

Mr. Magid: The defendant will stipulate that may be stricken, your Honor.

Mr. Sterry: If your Honor please, let's stipulate that his Honor can mark, instead of the dollar sign, the sign for number.

The Court: I will change the dollar sign to "No."

Q. (By Mr. Sterry): On your last column, "Our Cost," is that the cost of Madison [31] Buyers?

A. That is the cost to Madison Buyers.

Q. You have no records and you don't attempt to keep a record or find out what those items are sold for at retail? A. No, sir.

Q. There is one more item which I think is admissible. Aside from furniture, have you also in other divisions, not in Los Angeles, sold any large considerable quantities of tablewares, such as dishes and spoons and glasses?

A. Yes, we have, Mr. Sterry. We have tableware, such things as chinaware, plastic dishes, flat ware of various types, spoons. We probably, during this period of time, I haven't attempted to have

(Testimony of Frank Denney.)

our accounting department tabulate it, but an educated guess is we have sold somewhere in the neighborhood of a millon dollars worth of that type product.

The Court: But none in the Los Angeles area?

The Witness: Yes, we have, your Honor. We have sold flat ware in the Los Angeles area. It is not listed here. It was about 1953. Again, I would have to examine our records to precisely determine the quantity and the dates.

Mr. Sterry: That's all.

Cross-Examination

By Mr. Magid:

Q. Mr. Denney, your organization, like others of its kind, shops your competition, do you not? [32]

A. Do what?

Q. Shop your competition? You go into other stores——

The Court: What difference does that make?

Mr. Magid: I think it is just as important as the fact that somewhere outside of Los Angeles they sell spoons and tableware.

The Court: I am not satisfied that what they do in Dallas or Omaha or Little Rock has anything to do with the question before the court. I am not satisfied at the present time.

Mr. Magid: Then, if I may, your Honor——

Q. Confining ourselves to Los Angeles, your Exhibit 4 shows that you sell step stools in Los Angeles

(Testimony of Frank Denney.)

and have done so since January 5, 1952. Have you ever gone into Safeway Furniture Store and seen a step stool there?

A. I have never been in Safeway Furniture Store.

Q. Have any of your subordinates, to your knowledge, gone into the defendant's store for the purpose of checking to see what they sold?

A. Not to my knowledge.

Q. Have you examined any of their advertisements in the newspapers? A. I personally?

Q. Yes. A. No, I haven't. [33]

Q. Have you caused any of your subordinates to do that?

A. No. That is not a normal responsibility of my organization to examine that.

The Court: The question is, did you do that?

The Witness: No, sir, I have not.

Mr. Magid: I have no further questions, your Honor.

Mr. Sterry: If your Honor please, I overlooked one question. May I ask it?

The Court: Yes.

Mr. Sterry: It is not my policy to have redirect, but I want to offer this as part of my direct.

I think I would agree entirely with your Honor that what they do in Dallas or other places would not be material here if we were not able to show that it is not a mere possibility, but that we are intending to and going to immediately do the same

(Testimony of Frank Denney.)

thing here, and this question is asked on that theory.

Redirect Examination

By Mr. Sterry:

Q. This calls for yes or no, not what it is. Have you in buying this non-food line that you have shown had to keep track of what your competitors are doing, large and small, individual markets, small and large chains of stores?

A. Yes, I have. [34]

Q. What has been the tendency, if any, of your competitors to sell merchandise of that character?

Mr. Magid: I object to that, if the court please, not being within the issues of this case, irrelevant, immaterial.

The Court: Mr. Sterry, I know the tendency of most of the supermarkets is to go in all lines of business. In fact, there are even some who are selling clothing.

Mr. Sterry: Yes.

The Court: But I don't think it has a thing to do with this case. The question here is whether or not the plaintiff has a right to preclude the defendant from using the word Safeway.

Mr. Sterry: That is true, but, if your Honor please, my only thought—I don't want to argue with the court after he has made a ruling, and I don't understand your Honor has—my only object is I expect to put on Mr. Christenson, the new

(Testimony of Frank Denney.)

manager of the division who, I think, will convince your Honor we intend to do just this.

The Court: I may allow him to testify.

Mr. Sterry: And we have to do it to meet competition.

The Court: I may allow him to testify what he wants to do, but that is not the question. The question is, what do your competitors do? [35]

Mr. Sterry: I think that is only cumulative of the evidence to show that that is what we have to do.

The Court: I will sustain the objection upon the ground that it is not material as far as this witness is concerned.

Mr. Sterry: Very well, if the court please. That's all, Mr. Denney.

The Court: You may step down.

(Witness excused.)

Mr. Sterry: Mr. Denney came down from San Francisco. May we excuse him to leave?

Mr. Magid: Certainly.

The Court: You may be excused.

Mr. Sterry: Mr. Heller.

MILTON F. HELLER

called as a witness by and on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name?

The Witness: Milton F. Heller.

The Clerk: Please spell your last name.

The Witness: H-e-l-l-e-r. [36]

Direct Examination

By Mr. Sterry:

Q. Mr. Heller, where do you live?

A. 895 San Marino Avenue, San Marino.

Q. Are you now connected with the plaintiff, Safeway Stores, Incorporated?

A. I am retired, but I am still an employee of the company.

Q. You are still just as much interested in their success as though you were with them?

A. Yes, sir.

Q. Before your retirement, what was your position? A. Division manager, Los Angeles.

Q. Now, the division of Los Angeles, what district is comprised in the Los Angeles division?

A. Everything, including San Luis Obispo, Kern, Inyo, south to the Mexican border, and including two stores in Las Vegas, Nevada.

Q. When did you first go with Safeway?

A. January 1, 1932.

Q. Where? A. San Diego.

(Testimony of Milton F. Heller.)

Q. When did you take over the management of the Los Angeles division?

A. January 1, 1949. [37]

Q. Since then you held that position continuously until your retirement? A. Yes, sir.

Q. And when was your retirement?

A. Well, Mr. Christenson took over May 7th. That is when the change occurred.

Q. I forgot to ask you, Mr. Heller, your age.

A. 62.

Q. And, Mr. Heller, you have been, during the time that you have been manager, in control, subject to the directions of the head office, of the entire division? A. Yes, sir.

Q. Now, I think everything you can testify to has been admitted either by failure to deny allegations or by answers to our interrogatories, but defendant has asked us to stipulate and will undoubtedly offer a stipulation that there are some 85 registrations of fictitious names using the word Safeway. I want to ask you if during your entire time as manager of this division you were conscious of any other concern that ever used the word Safeway as a word to advertise or prominently used it in the manner in which it has been in Exhibits 1, 2 and 3?

A. Not insofar as advertising or the use of the name publicly or on buildings is concerned, other than the case we had in San Diego. [38]

Q. May I refresh your recollection that there

(Testimony of Milton F. Heller.)

were two cases where it was attempted that you directed our office to bring action to stop it?

Mr. Magid: That, if your Honor please, is objected to as being irrelevant, immaterial, incompetent, what communications passed between the witness and counsel's office.

The Court: He said that for the purpose of refreshing his recollection. Overruled. Does that refresh your recollection?

The Witness: I did not realize, your Honor, that that was included in the question originally. There have been cases where the name Safeway was used. One I have particularly in mind is the Safeway Realty Company, which was a name on West Adams. When it was brought to their attention that there was confusion in the minds of some people, that that was possibly a Safeway Stores' operation, they desisted from using the name.

Q. (By Mr. Sterry): Mr. Heller, whenever your attention has ever been called to the use of the word Safeway by itself or even prominently by any other concern, what action, if any, have you taken?

A. We advised our legal department at Oakland.

Q. Were you—this is a yes or no question—were you ever, during the time you were manager, conscious of any widespread use of the name Safeway at all? [39] A. No.

Mr. Sterry: Take the witness.

(Testimony of Milton F. Heller.)

The Court: Before you take the witness, may I ask a question of the witness?

Mr. Sterry: Certainly, your Honor.

The Court: You say you came with Safeway in 1922?

The Witness: 1932.

The Court: 1932. You don't know anything about Safeway prior to 1932?

The Witness: Other than they were a competitor of ours at that time in San Diego.

The Court: Before 1932, where were you?

The Witness: I had been in the grocery business almost 44 years.

The Court: Where?

The Witness: Part of the time here and prior to that in San Diego.

The Court: But your first connection with the word Safeway was in 1932?

The Witness: As an employee of the company, I was aware of it prior to that, because I was with MacMarr Stores prior to Safeway, and prior to that with Heller's, Incorporated.

The Court: You knew there was Safeway Stores?

The Witness: Yes.

The Court: But you had no personal knowledge of the [40] store or its operations until 1932?

The Witness: Other than as a competitor.

The Court: Other than as a competitor. All right.

(Testimony of Milton F. Heller.)

Cross-Examination

By Mr. Magid:

Q. Mr. Heller, as division manager of the Los Angeles district, you visited your different stores at different times? A. Yes, sir.

Q. Have you ever been to the Safeway Furniture Store in Van Nuys?

A. Not in that store. I have observed it from the outside.

Q. You have observed it from the outside?

A. Yes, sir.

Q. Where is the nearest Safeway Store belonging to the plaintiff with relation to the defendant's place of business?

A. There was one on Friar Street, I believe, just off of Van Nuys Boulevard. That store has since been closed. I could not, without examining a map, tell accurately the closest one. Perhaps the one at Van Nuys and Castor. I am not sure.

Q. It can't be at Van Nuys and Castor. They both run the same way.

A. Not Van Nuys. I beg your pardon. [41] Ventura.

Q. Ventura and Castor? A. Yes.

Q. That would be four, about four and a half miles from Victory and Van Nuys Boulevard?

A. No, sir, it would not. I would judge it wouldn't be over a mile and a half, two miles.

Q. Isn't it true it is exactly three miles from Victory Boulevard to Ventura Boulevard?

(Testimony of Milton F. Heller.)

A. You couldn't prove it by me.

Mr. Whelan: Your Honor, I believe counsel is arguing with the witness.

Q. (By Mr. Magid): Are you familiar with the San Fernando Valley where Safeway Furniture Store is located? A. Yes, sir.

Q. Do you know there is exactly a measured half mile between each boulevard? A. No.

Q. Have you observed that in your——

A. I have had no occasion to, as a matter of fact.

Q. Can you tell how many boulevards there are between Victory Boulevard and Ventura Boulevard? A. No.

Q. Do these names refresh your recollection, going south from Victory Boulevard to Ventura Boulevard, Oxnard? A. Yes. [42]

Q. Burbank? A. Yes, sir.

Q. Chandler? A. Yes, sir.

Q. Magnolia?

A. I don't know whether Magnolia crosses Van Nuys or not.

Q. Riverside Drive?

A. I think it dead ends.

Q. That's right, but Riverside Drive dead ends at Van Nuys Boulevard at the left going south, is that correct?

A. Well, the streets change very often, as you know. I wouldn't say that it is or is not. You seem to know whether it is correct or not.

(Testimony of Milton F. Heller.)

Q. After Riverside Drive we have Moor Park, is that correct, where the Cadillac people are?

A. The only Cadillac I know is on Ventura Boulevard, and that doesn't extend to Van Nuys. That is your question. You seem to be familiar with the streets and where they dead end.

Q. Then you have Ventura Boulevard?

A. Yes, sir.

Q. Do you know how far it is from Van Nuys Boulevard west to Castor?

A. About a quarter of a mile, I should [43] judge.

Q. If I should tell you it is exactly one-half mile, would that refresh your recollection?

A. I don't know anything about your measurements.

The Court: Just a minute. May I suggest that if this witness can't, then that you have testimony as to the distance? Why argue with the witness when you can establish it yourself? You know we are working against time on this case.

Mr. Magid: That is why I told your Honor I doubted if we could get through in a day and a half.

The Court: If you keep the case to the issues, I don't know how it will take a day and a half.

Mr. Sterry: If your Honor please, I don't believe it is material how close his store is there, but I haven't objected.

The Court: This witness doesn't know. Why proceed along that line?

(Testimony of Milton F. Heller.)

Q. (By Mr. Magid): At any rate, there is no Safeway store now in Van Nuys, is that correct?

A. Sherman Oaks—I beg your pardon. The one at Castor and Ventura, I would consider in Van Nuys, and we have a site now at Sherman and Van Nuys we expect to build on.

Q. You do not know, then, that your post office address would be Sherman Oaks and not Van Nuys?

A. I don't know anything about post office address. We have only one post office address, and that is at the Terminal Annex. [44]

Q. Did you ever notice the huge sign of Safeway Loans on Sunset Boulevard near Cahuenga?

A. No, sir.

Q. Did you ever notice the sign of Safeway Finance Company on Sunset Boulevard?

A. No, sir.

Q. Did you ever see the sign of Safeway Auto Parks in Los Angeles? A. No, sir.

Q. Did you ever see the sign of Safeway Lock Company in Los Angeles? A. No, sir.

Q. Have you gone to any of your Safeway Stores in Burbank? A. Yes, sir.

Q. Have you ever noticed a sign of Safeway Service of Burbank? A. No, sir.

The Court: You have never noticed any store that used the word Safeway, have you, except the Safeway stores?

The Witness: That is the only one I am conscious of.

(Testimony of Milton F. Heller.)

The Court: That's the only one you are conscious of.

Mr. Magid: I have no further questions. [45]

Mr. Sterry: That's all.

The Court: May this witness be excused?

Mr. Magid: By the defendant he may be.

Mr. Sterry: Certainly.

The Court: You may be excused.

Mr. Sterry: Mr. Ludke.

HENRY J. LUDKE

called as a witness herein by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Henry J. Ludke.

The Clerk: Spell your last name.

The Witness: L-u-d-k-e.

Direct Examination

By Mr. Sterry:

Q. Mr. Ludke, where do you reside?

A. 4006 Westside Avenue, Los Angeles.

Q. You are employed by the plaintiff in this case? A. Yes.

Q. Please keep your voice up. In what capacity?

A. Advertising manager for Southern California.

Q. The Los Angeles division?

A. Los Angeles zone. [46]

(Testimony of Henry J. Ludke.)

Q. Mr. Ludke, most of the advertisements have been admitted and stipulated to, and his Honor has stated, and I think quite correctly, an advertisement speaks for itself, so I will ask you just generally, have you advertised throughout the San Fernando Valley and Van Nuys and the vicinity in all the local papers out there? When I say you, I mean the plaintiff. A. Yes, we have.

Q. For how long a period of time has the plaintiff advertised only under the name of Safeway, without using the other words in its name?

A. I would say 15 years or more.

Q. At least 15 years? A. 15 years.

The Court: Let's get that down to some year. What year would you say you started to use the word Safeway only?

The Witness: We can say, I think it is 20 years.

The Court: Well——

The Witness: Say 15 years.

The Court: Can you give me the year?

The Witness: I don't know the exact year, but we looked it up, and it is over 15 years, we will say.

The Court: Around 1940 some time?

The Witness: Before that. 1936.

The Court: 1936. How long have you been with the [47] company?

The Witness: I have been with the company since February 5, 1929.

The Court: Before 1929 where did you work?

The Witness: I was with the Piggly-Wiggly Company.

(Testimony of Henry J. Ludke.)

The Court: Did you come to the Safeway Company when it was organized?

The Witness: I came to Safeway when Safeway purchased the Piggly-Wiggly Company in 1929.

The Court: When did you start to use the word Safeway?

The Witness: Back 20 years.

The Court: They didn't use the word Safeway before 1929, did they?

The Witness: They used Safeway, the Safeway Company, as I understand the——

The Court: I don't want your understanding. This is of your own knowledge. Do you know? I am asking your own knowledge. When did they use Safeway first of your own knowledge?

The Witness: In 1926 is when Safeway Stores, the name, was first used.

The Court: Some time in 1926?

The Witness: I think the anniversary is March, 1926.

The Court: March, 1926. Are you relatively sure [48] that the word Safeway was used for the first time by your company in March, 1926?

The Witness: Yes. I am very sure. That is when the company was organized.

The Court: Have we got anything to establish this date, Mr. Sterry?

Mr. Sterry: It is stipulated, your Honor, they have always used Safeway, but they have advertised, according to the stipulation, in affidavits which have been admitted, since 1941.

(Testimony of Henry J. Ludke.)

The Court: Mr. Sterry, here is the question that has bothered me ever since I read your stipulation. According to the stipulation, there were certain organizations and businesses that used Safeway in 1926.

Mr. Sterry: Yes. They were all associated with the plaintiff corporation.

The Court: No. Here is Safeway Cab Company in 1926, and here is Safeway Auto Finance Company in 1926, and here is Safeway Lock Company in 1926. Now, if the word Safeway had been used or was in common use, could anybody come in after that time and establish a right by which they could appropriate the name?

Mr. Sterry: If your Honor please, if you will read some of the decisions by the Ninth Circuit Court of Appeals——

The Court: Mr. Sterry, according to the rules of [49] court, a trial memorandum is supposed to be filed with the court five days before trial. I just looked at the file and neither the plaintiff nor the defendant has filed any trial memorandum, and, consequently, I have got to rely on the information I have.

Mr. Sterry: That is my mistake. I filed and handed to your Honor a trial brief.

The Court: But I haven't had a chance to look at it.

Mr. Sterry: I don't think there was any general use of it.

The Court: I don't care whether it was ever

(Testimony of Henry J. Ludke.)

used or not, but here was a use of the word Safeway and according to your complaint, you allege you originated the word Safeway.

Mr. Sterry: Yes, and the Ninth Circuit Court of Appeals has so held.

The Court: That you originated it?

Mr. Sterry: They held it was a coined word.

The Court: You say in 1926 you coined the distinctive trade name Safeway. Did you adopt it from the use of somebody else?

Mr. Sterry: No, I don't think so.

The Court: I would like to know when in 1926 you adopted and first started to use the word Safeway? Can you establish that in any way?

Mr. Sterry: Only by the records and the stipulation. [50] We started in 1926. I think that was when the company first organized.

The Court: This witness says he thinks it was March, 1926.

Mr. Sterry: Well, I can't tell you more than that, if your Honor please. That is 30 years ago.

The Court: This may be important.

Mr. Sterry: Mr. Whelan calls my attention to this affidavit, which is admitted to be true. I haven't read it for some time.

The Court: Is that in the file?

Mr. Sterry: Yes. That has been filed, if your Honor please.

Mr. Whelan: It is Exhibit Q to the request for admissions which was filed in this case.

Mr. Sterry: Paragraph 8, page 4, "that as to

(Testimony of Henry J. Ludke.)

the use of the trade name 'Safeway' in California"——

The Court: What line is that?

Mr. Sterry: Page 4.

The Court: Line what?

Mr. Sterry: Line 5.

The Court: All right.

Mr. Sterry: Should I read it or does your Honor want to read it?

The Court: Go ahead, if you want to. [51]

Mr. Sterry: "That from 1925 until in the early part of 1941, Safeway of California operated in California retail grocery stores primarily under the name of 'Safeway,' although in some cases the names 'Safeway Stores,' 'Safeway Stores, Incorporated,' or 'Safeway Stores, Inc.,' were also used; that some stores when first acquired by Safeway of California were operated under names other than 'Safeway'—for example, in about 1929, Safeway of California acquired the assets and business of a chain of retail stores in California operating under the name of 'Piggly-Wiggly,' pursuant to franchise from the Piggly-Wiggly Corporation; Safeway of California made other acquisitions, such as the acquisition of the assets and business of MacMarr Stores, Inc., and its subsidiaries in 1931; as the result of these acquisitions, the trade names 'Piggly-Wiggly' and 'MacMarr' were continued in use on the stores so acquired for some time, but

(Testimony of Henry J. Ludke.)

gradually the use of all trade names other than 'Safeway' was discontinued;

"That from the early part of 1941 until its dissolution as of the close of business on December 31, 1942, Safeway of California operated in California retail grocery stores under the trade name 'Safeway' alone."

The Court: You don't have to go any further than that. Of course, this is an affidavit.

Mr. Sterry: But it was admitted.

The Court: All right. But when did they first use [52] the name Safeway? They say about 1925. I want something definite, not just approximately.

Mr. Magid: If your Honor please, the request for admissions, page 8, request No. 34, the first sentence which was admitted, says since 1926. That was admitted. Not the affidavit, which says 1925.

The Court: I am going to have some definite testimony here as to when the word Safeway was actually used. I don't know what the law is, but it seems to me if a word is used, somebody else cannot come in and appropriate it and then by extensive advertising build it up and preclude everybody from using it.

Mr. Sterry: Your Honor, Mr. Whelan tells me that the statement of counsel refers to requests 33 and 34, and not to the request which I read from Mr. Wilde's affidavit.

The Court: Is Mr. Wilde going to be here?

Mr. Sterry: I can have him here, but you will have to continue it. When he makes an affidavit of

(Testimony of Henry J. Ludke.)

all he can testify to and it is admitted, I hadn't supposed it was necessary to have him here. I had supposed under the practice——

The Court: All right. But I can't take his testimony or I won't take his testimony as final that about so and so something happened. I am going to have something more definite than that. The problem here is the plaintiff says they originated the word Safeway. [53]

Mr. Sterry: Yes.

The Court: A doubt is in my mind whether they did originate the word Safeway. I think you picked up a word that was in use. I don't think there is any question they have built up the word until Safeway means Safeway Food Store. I am willing to go along on that.

Mr. Sterry: If it obtained that secondary meaning, then under all the authorities, we have a right to protect it. If someone has used it, and we have taken and built it up, we have got a right to protect the secondary meaning.

The Court: But we have got a stipulation that there is at the present time any number of people in this community using the word Safeway. Are you going to bring an action against each of them and make them quit using the word Safeway?

Mr. Sterry: I feel very remiss in not having filed this trial brief of mine sooner than I did. I was unaware of your rule or I would have done it. But if your Honor will take occasion to read it or permit me to read to you the cases, they are unani-

(Testimony of Henry J. Ludke.)

mous from the Ninth Circuit down that the fact that other persons use the name is no defense.

The Court: Mr. Sterry, we tried a case in this department not very long ago, the Fairway case. That involved the Fairway Food Market. That case went to the Ninth Circuit. I am thoroughly familiar with the law relative to the appropriation of names and the use of names and the question [54] of confusion. I am thoroughly familiar with that. But here is one problem I am not familiar with. If you use a name that is in public use, can you build it up to such an extent that you can preclude everybody else from using that name in any line of endeavor?

Mr. Sterry: If you have attained a secondary meaning. Suppose somebody in 1900 had used the word and abandoned it, but then you come along and use it and build up a secondary meaning. If your Honor please, I realize I am at fault, but our brief will show at least five or six decisions by this court and by the Ninth Circuit holding that that has a secondary meaning.

The Court: Mr. Sterry, I am willing to go along with you as far as food markets are concerned, that Safeway has established a secondary meaning in this community. Safeway means food markets. But you are going beyond the food markets. You are going into the furniture field. Now, whether or not your secondary meaning can be extended into the furniture field is something I do not know.

(Testimony of Henry J. Ludke.)

I noticed the other day, Mr. Sterry, after I received this case and was looking at it, there was a truck going up and down Spring Street, and on the side of it it said Prudential Cleaners. If any name has got a secondary meaning, it is Prudential Insurance Company. Does Prudential Insurance Company preclude anybody in an alien field from using that? [55]

Mr. Sterry: You have asked me several questions which are severally treated in this brief. I trust your Honor will allow me to present the law. If I am negligent in not filing this brief with you five days earlier, I trust you will not hold that against my client.

The Court: I will give you every opportunity to present the law. I am interested in the facts at the present time. One of the facts I am interested in is when the plaintiff first started to use the word Safeway.

Mr. Sterry: If your Honor please, that is set out in Mr. Wilde's affidavit, and I think probably it is as definite as it can be at this time.

The Court: May I ask a question? When was Safeway first incorporated? Maybe we can get it that way.

Mr. Sterry: I couldn't tell you that. I will have to telegraph or have somebody from Safeway here. Unfortunately, I can't do it tomorrow. I can look through these affidavits again. The affidavit of Mr. Wilde, and your Honor said you couldn't receive the affidavit, and that, of course, is correct. It was only

(Testimony of Henry J. Ludke.)

an affidavit. But I filed that affidavit and we asked for admissions, and they admitted it was correct. If they hadn't admitted it and we brought Mr. Wilde down here and proved it, your Honor would have had the right to assess costs upon him. Mr. Wilde's affidavit states it was filed in 1925. [56]

The Court: Let's read what Mr. Wilde says.

Mr. Sterry: All right.

The Court: "That from 1926"—he doesn't say the first part of 1926—"from 1926, and, thereafter, until the close of business on December 31, 1942, Safeway Stores, Incorporated, a Maryland corporation, owned the stock of, controlled and managed Safeway Stores, Inc., a California corporation * * *"

It doesn't say anything about when the California corporation was organized.

Mr. Sterry: Yes; if your Honor please, if you will turn to page 5. Let me read it.

The Court: All right. What page?

Mr. Sterry: I will start from the very beginning of Exhibit Q, starting on page 1:

"That he is now and since February 22, 1931, has been associated with and/or employed by Safeway Stores, Incorporated, a Maryland corporation (hereafter sometimes called Safeway of Maryland), and/or its former subsidiary, Safeway Stores, Inc., a California corporation (hereafter sometimes called Safeway of California);

"That as secretary of Safeway of Maryland, one

(Testimony of Henry J. Ludke.)

of his duties is to maintain the corporate records of said Safeway of Maryland;

"3. That in his capacity as secretary of [57] Safeway of Maryland he has access to and has examined the pertinent original corporate records of all former subsidiaries of said Safeway of Maryland, hereinafter referred to.

"4. That all facts hereinafter set forth for the period since February 22, 1931, are within his personal knowledge true and correct, and all facts hereinafter set forth for the period prior to February 22, 1931, are based upon his examination of the pertinent original corporate records and as to all such facts he is informed and believes that such facts are true and correct.

"That as to Safeway Stores, Inc., a California corporation, he says:

"That on August 14, 1914, Sam Seelig Company, a California corporation, was organized and authorized to engage in a general retail grocery business in California;

"That in 1925, by amendment of its articles of incorporation, the name of Sam Seelig Company, a California corporation, was changed to Safeway Stores, Incorporated, a California corporation;

"That in 1934, by amendment of its articles of incorporation, the name of Safeway Stores, Incorporated, a California corporation, was changed to Safeway Stores, Inc., a California corporation;

"That as of the close of business on December 31, 1942, Safeway Stores, Inc., a California corpora-

(Testimony of Henry J. Ludke.)

tion, transferred [58] all of its assets, good will, etc., to Safeway Stores, Incorporated, a Maryland corporation, in complete liquidation.

"That as to Safeway Stores, Inc., of Nevada, a Nevada corporation (hereinafter sometimes called Safeway of Nevada), he says:

"A. That on August 4, 1926, Skaggs-Safeway Stores, Incorporated, a Nevada corporation, was organized, and in 1934 was qualified to engage in and commenced to operate a general retail grocery business in California;

"B. That in 1928, by amendment of its articles of incorporation, the name of Skaggs-Safeway Stores, Incorporated, a Nevada corporation, was changed to Safeway Stores, Incorporated, a Nevada corporation;

"C. That in 1941, by amendment of its articles of incorporation, the name of Safeway Stores, Incorporated, a Nevada corporation, was changed to Safeway Stores, Inc., of Nevada, a Nevada corporation;

"D. That as of the close of business on December 31, 1942, Safeway Stores, Inc., of Nevada, a Nevada corporation, transferred all of its assets, good will, etc., to Safeway Stores, Incorporated, a Maryland corporation, in complete liquidation.

"7. That as to Safeway Stores, Incorporated, a Maryland corporation, he says:

"A. That on March 24, 1926, Safeway Stores, Incorporated, [59] a Maryland corporation, was organized;

(Testimony of Henry J. Ludke.)

"B. That from 1926, and, thereafter, until the close of business on December 31, 1942, Safeway Stores, Incorporated, a Maryland corporation, owned the stock of, controlled and managed Safeway Stores, Inc., a California corporation, and Safeway Stores, Inc., of Nevada, a Nevada corporation, and during all of said period said Safeway Stores, Inc., a California corporation, and Safeway Stores, Inc., of Nevada, a Nevada corporation, were operating subsidiaries of said Safeway Stores, Incorporated, a Maryland coropration;

"C. That as of the close of business on December 31, 1942, Safeway Stores, Incorporated, a Maryland corporation, acquired all of the assets, good will, etc., of Safeway Stores, Inc., a California corporation, and Safeway Stores, Inc., of Nevada, a Nevada corporation, in complete liquidation of said subsidiaries."

So that, your Honor, in effect it says they have been operating in California, first as an independent and then as subsidiaries of the present business, since 1925.

"8. That as to the use of the trade name 'Safeway' in California, he says:

"A. That from 1925 until in the early part of 1941, Safeway of California operated in California retail grocery stores primarily under the name of 'Safeway,' although in some cases the name 'Safeway Stores,' 'Safeway Stores, Incorporated,' [60] or 'Safeway Stores, Inc.,' were also used; that some stores, when first acquired by Safeway

(Testimony of Henry J. Ludke.)

of California, were operated under names other than 'Safeway'—for example, in about 1929, Safeway of California acquired the assets and business of a chain of retail stores in California operating under the name of 'Piggly-Wiggly,' pursuant to franchise from the Piggly-Wiggly Corporation; Safeway of California made other acquisitions, such as the acquisition of the assets and business of MacMarr Stores, Inc., and its subsidiaries in 1931. As a result of these acquisitions, the trade names, 'Piggly-Wiggly' and 'MacMarr' were continued in use on the stores so acquired for some time, but gradually the use of all trade names other than 'Safeway' was discontinued;

"B. That from the early part of 1941 until its dissolution as of the close of business on December 31, 1942, Safeway of California operated in California retail grocery stores under the trade name 'Safeway' alone;

"C. That from 1934 until in the early part of 1941, Safeway of Nevada operated in California retail grocery stores principally under the trade name 'Safeway'; other trade names were sometimes used as a result of acquisitions of other chains as was done in the case of Safeway of California above set forth;

"D. That from the early part of 1941 until its dissolution as of the close of business on December 31, 1942, [61] Safeway of Nevada operated in California retail grocery stores under the trade name 'Safeway' alone;

(Testimony of Henry J. Ludke.)

"E. That commencing on January 1, 1943, and continuously ever since, Safeway of Maryland has operated in California retail grocery stores under the trade name 'Safeway' alone."

So that the substance of that is that this would be the predecessors in interest, or the wholly-owned subsidiaries of the plaintiff have used the name "Safeway" continuously from 1925.

The Court: Mr. Sterry, according to the affidavit, in 1925 there was an amendment of the articles of incorporation where the name was changed to Safeway Stores. Can't you get the records of this corporation so we can see what the amendment was and when it was made?

Mr. Sterry: Yes; I can get it, but not before tomorrow night.

The Court: The records are here in town?

Mr. Sterry: I don't believe so. They are all in Oakland. The main office of the company is in Oakland. I don't think any of the records are here. In fact, I am quite sure they are not. I hadn't supposed that was necessary because the affidavit states since 1925 we were continuously advertising under the name Safeway up until about some time—the date slips me, but they have occasionally used other names. [62]

The Court: If counsel will stipulate that is true, I won't require it. This is in the nature of an affidavit.

Mr. Sterry: But, if your Honor please, it is perfectly common practice, at least it has been the ex-

(Testimony of Henry J. Ludke.)

perience of my office, to ask for admissions, and to set out the admissions as stating a fact.

The Court: The admission says thereabouts. I want to know the month in 1925. I want to know when in 1925.

Mr. Sterry: If your Honor please, I can't see what difference it makes whether it was in March of 1925 or December, 1925.

The Court: It may not make any difference if it was in 1925, but I want to be certain it was in 1925.

Mr. Magid: If your Honor please, I might call to Mr. Sterry's attention that the Safeway Cleaners and Dyers filed a certificate of doing business in the County of Los Angeles, County Clerk's Office, April 4, 1925, and that is part and parcel of the court's records by stipulation, so it may be very pertinent.

The Court: It may be very important, Mr. Sterry. If two people are using a name, can a person then appropriate that name?

Mr. Sterry: If your Honor please, the defendant wasn't in business in 1925. The defendant started in recently. The stipulation on file is that the first four names in the [63] list here are——

The Court: Predecessors of the plaintiff.

Mr. Sterry: The first certificate filed in the County Clerk's office, according to the stipulation, is Safeway Stores, Incorporated, February 24—no; that isn't right.

Mr. Whelan calls my attention to the fact that the stipulation is that the first four names listed are

(Testimony of Henry J. Ludke.)

those of the plaintiff or predecessors in interest, and the plaintiff succeeded to all rights in said predecessors in interest. The first one in point of time filed with the County of Los Angeles Clerk under the name Safeway was the plaintiff or one of its predecessors in interest.

The Court: That might be your stipulation, but we have also another which shows Safeway Cleaners and Dyers was in business April 4, 1925.

Mr. Sterry: What of it, if your Honor please? Safeway——

The Court: May I suggest something to counsel?

Mr. Sterry: Yes.

The Court: I am certain that if you go down to the telephone company's office, you can find a directory for 1925. I would like to know if the telephone directory of 1925 showed any Safeway names, including Safeway Cleaners and Dyers and Safeway Food Stores. It may be that Safeway Food Stores wasn't even in the telephone directory in 1925. [64]

Mr. Sterry: I know, but, if your Honor please, if we can show that if obtained a secondary meaning at the present time, I don't care whether anyone used it or not. Under the decisions, we have a right to protection.

The Court: Mr. Sterry, I am not arguing the law at the present time. I want to know what the facts are. You may think this fact is not material. I don't know whether it is material or not, but I would like to have it before we get into a discussion of the law. I would like to know what day,

(Testimony of Henry J. Ludke.)

actually what day the Safeway Food Stores started using the word Safeway, and I would like to know in 1925 if another company was using the word Safeway, other than the Cleaners and Dyers and Safeway Food. I will ask counsel for the defendant, will you check the telephone directory?

Mr. Magid: I shall call the Telephone Company, your Honor. If we might take a five-minute recess, perhaps they can tell us whether those books are available.

The Court: We are going to recess for the day pretty soon. I am satisfied they have got a directory for 1925. You go down and look at it.

Mr. Sterry: If your Honor please, you evidently will be better satisfied if I have Mr. Wilde down here. He has been the secretary and he can probably answer those questions, but I can't possibly have him here by tomorrow. I can have him here Tuesday, or any other date. [65]

The Court: Mr. Sterry, I have got other cases set for next week. I rushed this case so I could try it this week. I have another case that I continued to give you preference. I am satisfied with this affidavit, but I want to know definitely. Maybe the telephone directory won't show there was a Safeway grocery in Los Angeles in 1925, but we may have other Safeway names in the directory in 1925. All we have here is what was in the County Clerk's Office. All fictitious names are not filed in the County Clerks' Office.

(Testimony of Henry J. Ludke.)

I don't know for sure, but I think one of the controlling factors in this case is going to be whether or not the plaintiff was the first user of the word Safeway. If the plaintiff was the first user of the word Safeway, it may have developed a secondary meaning of the word Safeway so as to exclude the word Safeway in any other line of business. But that is another problem.

Mr. Sterry: If your Honor please, under the authorities as I see them, if you develop a secondary meaning of a word, you are entitled to protection, especially against a secondcomer.

The Court: Mr. Sterry, unfortunately, or fortunately, I have a jury that is out, and I will probably have to stay here for another couple of hours or three hours or longer. That is going to give me an opportunity to read the trial brief, so I am going to read your trial brief. [66]

Mr. Sterry: Your Honor reads faster than I do, but I might say——

The Court: I may not read it all, but at least I will look over it and know what is in it.

Mr. Sterry: If your Honor please, may I make a suggestion to your Honor, and that is that you will find a heading in the index——

The Court: I will read your points and authorities. I can go over them pretty fast.

Mr. Sterry: So far as the use of the name by others, I know of no authorities contrary to those cited.

The Court: The court will stand in recess now until 10:00 o'clock tomorrow morning.

(Whereupon, an adjournment was taken until 10:00 o'clock a.m., Friday, May 25, [67] 1956.)

Friday, May 25, 1956—10:00 A.M.

The Clerk: No. 17553-HW Civil, Safeway Stores, Incorporated, v. Safeway Furniture Company, Inc., et al., further trial.

The Court: I think before we start this morning I can limit the issues in this case. I have had a chance, Mr. Sterry, to go over your brief, your trial brief, and to read some of the cases cited therein. I told you yesterday that I was familiar with the rule of unfair competition, that I had tried several cases in this court concerning that question.

In your brief you cite the case of Phillips v. The Governor & Co., 79 Federal Reporter (2d) 971. The court says this:

"Inasmuch as the defendant sells his fur products direct to the retail trade and the plaintiff sells no fur products to the retail trade in the United States, the defendant contends there is no competition between them and therefore there can be no unfair competition."

This is the important part: "This court, however, has carefully considered the question in Del Monte Special Foods Company v. California Packing Corporation and held that the two products need not be competitive."

I was familiar with the Del Monte Food Case. However, [69] I don't think that the Del Monte Food case is as emphatic as the court is in the Phillips case.

That seemed to have been the rule, but it seems to me that this rule has been modified by two recent decisions of the Ninth Circuit. I called your attention yesterday to the Fairway Foods case, which was tried in this court some time ago, in which the Circuit wrote an opinion on November 9th of last year. That was the case in which the Fairway people had established a secondary meaning of the name Fairway in the Middle West. They had never come out to California.

A store, a food store was established here in Los Angeles and used the word Fairway, and they came out here and tried to restrain the local Fairway from the use of the name Fairway.

Now, they said that they were competitive, although I found against them, and the finding was upheld by the Circuit.

One of the things in that case that I am interested in was that they said, "Well, we expect to extend our activities into California. We never have been in California, but we expect to extend our activities into California."

The Ninth Circuit in that case, Judge Stephens wrote the opinion, Judge Stephens says:

"We gain from the record that the judgment is based upon the court's view of the law that whether or not the marks [70] are valid under the statute, they do not and cannot be effective as against the

defendant for the reason that the facts of the case do not show any competition or likelihood of competition or dilution of plaintiff's goodwill."

I still say that under this particular opinion the competition is still one of the elements to be considered.

Now, relative to the question of future activities, in that particular case I found in favor of the local Fairway store and also I went one step further and said:

"Inasmuch as the Fairway chain intimates that they expect to come into California I would restrain them from interfering with the local Fairway people if they did come."

Now, Judge Stephens says, "Government by injunction is never favored and the discretion of the chancellor in favor of granting the writ is withheld except to prevent impending injury or wrong and is not granted upon indefiniteness and remote possibility. It may be that if and when plaintiff acts to carry out the expressed intentions to expand into the territory previously occupied by the defendant the facts will be sufficiently different from those of the instant case as to commerce and otherwise and as to validity of the claimed trademark as to present additional and different issues."

The Circuit reversed me because I had given the restraining order, restraining some future activity. [71]

I bring that out because of the statement you made yesterday to the effect that the Safeway people expect to go into the furniture business.

Now, the latest case, latest decision on this matter is another case that was tried in this court. It is not even in the bound volumes yet. It is in the Advance Sheets. It was decided December 13, 1955. It is Wian Enterprises vs. Persinger. Now, in that case the plaintiff had established a drive-in series of restaurants known as Big Boy, and they had had a sandwich that they called the Big Boy sandwich.

Mr. Sterry: I am entirely familiar with the Big Boy case.

The Court: I am going to read what the Circuit has to say about the case. The defendant in that case commenced to manufacture barbecue equipment under the name of Big Boy Manufacturing Company, and the Big Boy restaurants filed an action to restrain the defendants upon the ground that there was unfair competition, that they specialized in hamburgers and the cooking of hamburgers, and here was a manufacturer that was making barbecue equipment on which hamburgers could be cooked, and consequently there was such a close relationship that there would be unfair competition.

Well, I held as a matter of law that there was no unfair competition. An appeal was taken and I was reversed. But this is what the Circuit said in the reversal: [72]

"There seems to be little likelihood of confusion of identity of product."

Well, now, if the rule as laid down in the Phillips case, that the two products didn't have to compete is right, why would it make any difference whether

there was any likelihood of confusion? The articles didn't have to compete, but the Circuit says:

"There seems to be little likelihood of confusion of identity of product, but upon a trial there may be some proof of confusion of source that entitles plaintiff to some relief."

So I think that the rule laid down in the Phillips case and in the Del Monte case has been modified by these two later decisions of the Ninth Circuit, and it is not the rule now that the products don't have to be in competition. I think there has to be some competition between the people.

Now, I may be wrong. But it seems to me from a reading of these two latest decisions that the Circuit is holding that there must be some competition.

Mr. Sterry: If your Honor please, I have considered both those cases. I think they have no application to this case. Of course, quite often court and counsel disagree, and that is what your Honor is there for. I trust you will give me an opportunity to fully discuss those cases and show their inapplicability. [73]

The Court: Well, I don't expect, Mr. Sterry, to decide this case from the bench. I expect to take it under submission when I find out what all the facts are, but I am calling your attention to the two latest cases.

Now, in your case that you cited, Great Atlantic & Pacific Tea Company vs. A. & P. Radio Stores, this was the District Court of Eastern Pennsylvania. This was a District Court case. But, however, in that case the plaintiff was engaged in the sale of

food and household appliances. The defendant was engaged in the business of selling new and second-hand radios, washing machines, electric refrigerators.

Now, if the rule as laid down by these other cases is the rule in California, I think that you are correct in saying there doesn't have to be any competition, but whether or not that is the rule in California is something that we are going to have to determine.

Mr. Sterry: All right. If your Honor please, may I make one practical suggestion?

The Court: All right.

Mr. Sterry: I always appreciate a judge calling my attention to decisions that he thinks are contrary or may be contrary. I assure your Honor I had read both of those.

As far as the Big Boy case was concerned, I knew about it when your Honor was there, and I advised the counsel for the appellants not to raise this question of lack of competition, [74] because in that case I think there had to be, but I don't want to enter into an argument now.

The point is we had our advertising manager on and your Honor raised the question then as to an issue which is not raised by the pleadings, but I have two or three businessmen who are very anxious to get away. They will take about 10 minutes apiece.

The Court: Let's get them on, then.

Mr. Sterry: I should like to put in their testimony and then discuss it orally or write a brief or anything else.

The Court: Call them in and let's have the testimony.

Mr. Sterry: Oh, if your Honor please, there is one thing. You referred to a stipulation yesterday which is not in evidence and was made subject only to its relevancy. It is a stipulation of February 17, approved by your Honor, and in that it lists as the first listings of Safeway Stores, Inc., February 24, 1955. It should be February 24, 1925. Mr. Magid will so stipulate.

The Court: February what?

Mr. Sterry: 1925 instead of 1955, a difference of only 30 years.

The Court: Well, that helps the court immensely.

Mr. Whelan: Is that agreed to? Is that correct?

The Court: Is that page 2, line 8? [75]

Mr. Sterry: Page 2, line 8.

The Court: That ought to be 1925?

Mr. Whelan: 1925, your Honor.

The Court: All right. I will change it.

Mr. Sterry. I don't want to be technical. The stipulation is subject to objections, but the facts are there, and I want to object to it, but when it was called to my attention, it threw me for a loop yesterday, and I think it did your Honor.

Mr. Whelan: May I ask if Mr. Magid agrees?

The Court: Will you stipulate?

Mr. Magid: That is so stipulated. I would like to make this remark at this time, your Honor, if I may. It will take just a moment.

In accordance with the court's direction——

Mr. Sterry: Now, wait a minute. I want to get our witnesses in and get their testimony.

The Court: Just hold that until the witnesses have testified.

Mr. Sterry: We will have no objection about the facts, but I do want to make a record, Mr. Magid.

Will you take the stand? Your Honor hasn't any objection to my withdrawing the witness I was examining, have you?

The Court: Absolutely none. I am interested in the [76] facts, Mr. Sterry, more than anything else. Then later we can discuss the law.

Mr. Sterry: I appreciate that, your Honor, but judges vary and some of them don't like to have witnesses withdrawn.

W. A. CHRISTENSEN

called as a witness by and on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

The Clerk: You may be seated, and will you please state your name?

The Witness: W. A. Christensen.

Direct Examination

By Mr. Sterry:

Q. Mr. Christensen, will you please try to keep your voice up? I don't know why, but the man who built this room evidently tried to deaden sound as much as possible.

Where do you live, Mr. Christensen, at the present time?

(Testimony of W. A. Christensen.)

A. Currently, I am living at the Del Capri Hotel.

Q. In Los Angeles?

A. In Los Angeles, yes.

Q. Are you connected with the plaintiff in this action, Safeway Stores, Incorporated? [77]

A. Yes, sir.

Q. What is your position with that company?

A. My position is referred to as distribution division manager.

Q. For what division?

A. The Los Angeles division.

Q. When did you take that position officially?

A. May 7.

Q. Of this year? A. This year, 1956.

Q. Before that, had you been connected with the plaintiff? A. Yes, sir.

Q. Approximately, just approximately how long? A. 33 years.

Q. Before you came here, immediately before you came here, what had been your position with the defendant?

A. I held a similar position in Oklahoma. It was referred to as the Oklahoma City distribution division manager. That comprised the states of Oklahoma, Arkansas and the Panhandle of Texas.

Q. I think one of our witnesses yesterday filed an exhibit with stipulation of counsel and permission of court in which there were shown certain non-food items purchased by him or by the division of Safeway whose name I forget, that showed [78]

(Testimony of W. A. Christensen.)

several cities, and he stated they were all in the division, that each division is a city. Is that correct?

A. Well, not necessarily. A division includes a number of states.

Q. I understand, but I forgot to prove that by the witness yesterday. Will you look at No. 4 and state if all the cities there are not the ones where the particular divisions are located?

A. That is where the division headquarters are located, yes.

Q. That is what I mean. A. Yes, sir.

Q. How long have you been division manager in Oakland, or were you before you came here, Mr. Christensen? A. In Oklahoma?

Q. In Oklahoma, I mean.

A. About 12 years.

Q. So that you will understand the question, it has been stated that a very slight amount of the non-food items listed in Exhibit 4 have ever been handled in the Los Angeles division up to date. I want to ask you if you intend to handle any of those articles, or all of them, or any part of them?

Mr. Magid: That is objected to, if your Honor please, on the ground it calls for a conclusion of this [79] witness. It is not shown that this witness is an executive officer of the corporation, and that even if he does so intend to, that could have no binding effect upon the plaintiff corporation.

The Court: Overruled. You may answer.

The Witness: I am not familiar with Exhibit 4.

(Testimony of W. A. Christensen.)

Q. (By Mr. Sterry): Well, just look at Exhibit 4. I thought I showed it to you in my office.

The Court: May I ask this witness a question?

Mr. Sterry: Certainly, your Honor.

The Court: Does Safeway Stores intend to go into the furniture business here in Los Angeles? When I say furniture business, I mean the common, ordinary understanding of the word furniture.

The Witness: I think I understand what you mean. In other words, go into the general line, start selling a general line of furniture? We do not intend to do that.

The Court: You intend to sell special articles?

The Witness: That's right. We will sell first one thing and then another in the furniture line. We have been doing that in the past where I came from.

The Court: Look at the exhibit and then you can answer the question.

The Witness: I wish you would restate the question, please. [80]

The Court: Read the question.

(Question read.)

The Witness: We will likely handle—we will, I won't say likely, we will handle some of them, probably not all of them, because these items change from time to time, and they don't become identical, but as far as handling lawn chairs and metal TV tables and clothes baskets, step stools, such items as are listed in this Exhibit 4, we will be handling them from time to time, yes, sir.

(Testimony of W. A. Christensen.)

Q. (By Mr. Sterry): When you handle them, will you advertise them or not?

A. We will. We will advertise them.

Q. You have said you handled those items or many of them in your former division?

A. That is correct.

Mr. Sterry: I have some advertisements here from Oklahoma. If your Honor please, so that both you and counsel will understand, I do not contend that in California advertisements there would be binding. I have got a mass of them. I am taking a few to illustrate. I want to ask him if he intends to have substantially the same advertising here.

The Court: Mr. Sterry, under the Fairway case I don't think it makes any difference, because I am going to follow the rule in the Fairway case. However, I want to let [81] you make your record. The fact that they intend to enter into business doesn't make any difference. That is what I tried to do in the Fairway case and the Circuit said I couldn't do it. As long as that decision stands, I feel I am bound by it. However, I will let you make the record. You can go back and present it again in the Circuit and maybe they will change their mind.

Mr. Sterry: If your Honor please, I trust you will give me a chance to try to point out a very vast difference between the Fairway case and this. As a matter of fact, when I read it, I thought it had nothing to do with this case. I am perfectly frank to tell your Honor this. There are many cases similar to the Fairway case, but if your Honor will

(Testimony of W. A. Christensen.)

pardon me, I don't want to discuss it until I have put on the witnesses.

The Court: I want you to make your record. Go ahead and make your record.

Mr. Sterry: May I show this to counsel?

(Handing documents to Mr. Magid.)

Mr. Sterry: What is our last number?

The Clerk: Five.

Mr. Sterry: Will you mark these 5-A, -B, -C, and so forth?

The Court: They may be marked for identification only. [82]

Mr. Sterry: For identification only. I could add a great number more, but I think four or five of them is just as good.

The Clerk: 5-A to 5-F for identification.

(The exhibits referred to were marked Plaintiff's Exhibits Nos. 5-A through 5-F for identification.)

Q. (By Mr. Sterry): Will you look at 5-A to 5-F?

(Handing documents to the witness.)

A. Yes, sir.

Q. Are those correct microfilms or photographs, whatever process it is, of advertisements you ran in the papers in Oklahoma?

A. Yes, I would say those are true copies.

Mr. Magid: If your Honor please, we will object

(Testimony of W. A. Christensen.)

at this time to any queries concerning these exhibits for identification, on the ground, first, that they are not the best evidence, the best evidence being the newspapers themselves.

The Court: Overruled.

Q. (By Mr. Sterry): Now, I will ask you if you intend in handling these furniture items to advertise them in a similar manner here.

Mr. Magid: We object to that question on the ground that it calls for a conclusion on the part of this witness. We are getting into the realm of speculation. It [83] is not within the issues of this case.

The Court: Overruled.

The Witness: Yes, sir. We will handle them.

Mr. Sterry: Now, if your Honor please, I offer these simply as illustrations.

The Court: May I see the exhibits, please?

Mr. Magid: May I interrupt the court?

The Court: Yes.

Mr. Magid: Mr. Sterry said to the court we would be but ten minutes with these witnesses. I started to say at a quarter after 10 that pursuant to the court's instructions yesterday, we went to the telephone company library.

Mr. Sterry: Wait a minute. I do not want to stipulate that until I have a chance to object to it.

The Court: Just a minute. These exhibits may be received in evidence.

The Clerk: Exhibits 5-A to 5-F.

(Testimony of W. A. Christensen.)

(The exhibits referred to were received in evidence and marked as Plaintiff's Exhibits Nos. 5-A to 5-F.)

Mr. Magid: If your Honor please, what I am trying to tell the court is that I promised to call the legal counsel for the telephone company by 10:30 so that he could give us certain additional information, if it is still available in their records. I think as a courtesy to counsel for the telephone company, I should keep my appointment with him. [84]

The Court: We will keep it in mind. You may proceed.

Mr. Sterry: Mr. Whelan calls my attention to the fact that he didn't think the answer was responsive. May I have the last answer of the witness read?

The Court: Read the answer.

(Answer read.)

The Witness: We will sell and advertise them. Is that more responsive?

Q. (By Mr. Sterry): What I meant is your advertisements will be substantially along the lines of these exhibits that have just been introduced in evidence.

A. A similar type of advertising, yes. The fact that we will advertise them is probably the answer you will be interested in.

Mr. Sterry: That's all. You may take the witness.

The Court: Any questions?

(Testimony of W. A. Christensen.)

Cross-Examination

By Mr. Magid:

Q. Mr. Christensen, in Oklahoma did you ever sell in the plaintiff stores any living room furniture?

A. Yes, we have sold pieces of living room furniture.

Q. What kind?

A. We have sold wrought iron hassocks. We have sold [85] TV tables.

Q. Did you sell television sets?

A. No, sir.

Q. Did you sell any couches?

A. No, we haven't sold any couches.

Q. Do you intend to sell couches?

A. No, I certainly don't.

The Court: This witness has testified they don't intend to go into the general furniture business.

Q. (By Mr. Magid): Have you ever visited the store of the Safeway Furniture Company in Van Nuys? A. No, sir, I have not.

Q. Have you seen any of their advertisements?

A. Yes, I have seen some of them.

Q. Have you noticed any that have advertised any of the products that you have sold, are now selling, or intend to sell?

A. I did not scrutinize those ads with the thought in mind of comparing items that we had advertised with the articles that you are advertising

(Testimony of W. A. Christensen.)

or had advertised in your advertisements, but I would be glad to review them.

Q. Here are your Exhibits 1, 2 and 3.

The Court: I suppose it can be stipulated that the defendant does not sell food products or meat or vegetables, Mr. Sterry? [86]

Mr. Sterry: There is no issue on that point.

The Court: The only thing he sells is furniture.

Mr. Sterry: Yes.

The Court: That is correct, isn't it?

Mr. Sterry: Yes.

The Witness: Is it just the one ad?

The Court: Just the one ad.

Q. (By Mr. Magid): In the top page of each newspaper? A. Yes. I see one item here.

The Court: On what exhibit is that?

The Witness: On Exhibit 1, depicting a kitchen stool that appears to be identical with some that we have sold in Oklahoma in the past.

Q. (By Mr. Magid): That is part of a set, is it not?

A. Yes. It indicates it is advertised as part of a breakfast set.

Q. Part of a set?

A. Yes. Again, as in Exhibit No. 1, I note that there is a coffee table that appears to be a part of a living room suite that is quite a bit like some that we have advertised.

Q. Will you refer to Plaintiff's Exhibit 4 and

(Testimony of W. A. Christensen.)

show us where in that list there is a coffee table anywhere in the United States sold by plaintiff?

A. I did not mean to say that these items I refer to in the Safeway Furniture Company ads had been advertised in [87] Exhibit 4. I only said we had sold and advertised them in the division where I came from.

Q. Show me where in Plaintiff's Exhibit 4 it is listed, if it is.

A. Again, I did not intend to say that they were advertised in Exhibit 4. I only said we had advertised them, but you will have to take my word for that, or strike it out, either one.

Q. In other words, the list that is Plaintiff's Exhibit 4 is not correct?

A. I didn't say that. I think those are photostatic copies and true copies of our ad, but they don't comprise all the ads we have run.

Q. This is Plaintiff's Exhibit 4? A. Yes.

Q. Introduced by Mr. Sterry?

The Court: He doesn't say it is wrong. He says maybe they didn't have all the items in Exhibit 4.

The Witness: That is correct. That's right.

Mr. Sterry: If your Honor please, I believe the witness, whose name I forget, that identified Exhibit 4, stated those were the items he purchased, and that each division had a right to purchase additional items. If that is not so, I shall ask this witness.

The Court: I think that is true, but that is [88] the list we have before us.

(Testimony of W. A. Christensen.)

Mr. Magid: I have no further questions for this witness.

Mr. Sterry: I want to clear that up, your Honor, with one question.

Redirect Examination

By Mr. Sterry:

Q. Is it or is it not true, Mr. Christensen, each manager of a division has the right to purchase from other sources? A. Any store?

Q. Yes.

A. Yes, we can purchase from whomever we choose.

Q. And did you in Oklahoma purchase from others?

A. Yes, sir, we did, other sources, occasionally, yes, I did.

Q. I want to ask one question which I think is self-serving. You told the court you did not intend to go into the furniture business. By that you mean the operation of a furniture store as such?

A. That is correct.

The Court: Well, now, let's get this straight. You don't intend to go into the furniture business by placing the ordinary run of furniture in the Safeway Grocery Stores, [89] do you? You wouldn't intend to put in living room sets and dining room tables, chiffoniers, rockers?

The Witness: No.

The Court: In a grocery store?

(Testimony of W. A. Christensen.)

The Witness: No.

The Court: All right.

Q. (By Mr. Sterry): But you do intend to carry similar items?

A. That are carried in furniture stores, yes.

Q. That you did in Oklahoma?

A. Oh, yes, we will stock those items from time to time. In fact, we are in the process right now of buying some.

(Witness excused.)

The Court: Now, Mr. Sterry, we have got the general counsel of the telephone company here. I am sure he is not interested in the question of unfair competition, because he doesn't have any unfair competition. He is a monopoly. Suppose we let him come in and give his testimony. Do you have any objection?

Mr. Sterry: I wouldn't think of it. Due to the courtesies extended to me, it would be very unusual if I did. I didn't know the counsel for the telephone company was here.

The Court: I didn't know he was either, but I have counsel's word for it. [90]

Mr. Magid: No, your Honor, he isn't here. He is waiting for my call.

The Court: I thought he was in the courtroom.

Mr. Magid: No. He is waiting for me to call him back, and I promised I would call him at 10:30.

Mr. Sterry: Mr. Magid was going to telephone him, and I suggest he do it at the ordinary recess.

(Testimony of W. A. Christensen.)

Mr. Magid: I promised I would call him because the court wanted it for his information.

The Court: I thought he was here in court.

Mr. Magid: No, your Honor.

The Court: All right. Go ahead, Mr. Sterry.

Mr. Sterry: Mr. White, will you take the stand?

S. M. WHITE

called as a witness herein by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: S. M. White.

The Clerk: W-h-i-t-e?

The Witness: Yes.

Direct Examination

By Mr. Sterry:

Q. Mr. White, do you reside in Los [91] Angeles? A. Yes, sir.

Q. Where? A. At 3961 Dublin Avenue.

Q. How long have you lived here?

A. I have lived in Los Angeles since 1921.

Q. What is your occupation, if any?

A. I am the secretary-manager of the Southern California Retail Grocers Association.

Q. What is that association?

A. That is an association composed of principally individual or so-called independent retail operators of grocery stores and markets.

(Testimony of S. M. White.)

Q. Just approximately how many members have you?

A. Between fourteen and fifteen hundred.

Q. How long have you been secretary of that?

A. Since 1932—24 years.

Q. Before that, were you in the grocery business?

A. From 1921 to 1932, I was operating a retail market.

Q. Since 1934 as secretary, what has been your duty with reference to keeping informed with reference not only to the retail——

May I withdraw that, your Honor?

Does that include wholesalers of grocery products as well as retailers, or only retailers?

A. Only retailers. [92]

Q. Only retailers? A. Yes, sir.

Q. Will you tell the court what your duties as secretary of the association have been with reference to causing you to keep in touch with the general business retail methods of grocers and other retail concerns?

A. As secretary of this trade association, it is my duty to keep in contact as often as I can with the members of our organization. We publish a magazine which goes out weekly, in which we attempt to keep our members informed on matters that would be of interest to them in the trade, merchandising, and otherwise.

Q. During the time you have been secretary,

(Testimony of S. M. White.)

have you ever heard the plaintiff corporation referred to by other than the word Safeway?

A. No, sir, I don't believe so.

The Court: Mr. Sterry, I think that I can take judicial notice of the decisions in this district, and I don't think there is any question in my mind that Safeway has established a secondary meaning within this district of the word Safeway in the food market, within the grocery trade. I don't think there is any question about that. I don't think you have to establish the fact that there is a secondary meaning. I will take judicial notice from the cases that have been decided. [93]

Mr. Sterry: All right.

The Court: You have cited several cases here in this district, and I am satisfied that the word Safeway has a secondary meaning in this district in the food business. I am perfectly willing to go that far with you.

Mr. Sterry: All right.

The Court: You don't have to establish the secondary meaning.

Mr. Sterry: I will not pursue that any further, then, if your Honor please. I may make this statement: Your Honor yesterday referred to the stipulation which, as I called your Honor's attention to, has not been admitted and is subject to the objection. That stipulation is in two parts. It is subject to our objections which we are going to interpose as to the number of registrations of fictitious names since 1925.

(Testimony of S. M. White.)

The Court: Don't argue that question here.

Mr. Sterry: No.

The Court: Let's get rid of the witness.

Mr. Sterry: I understand, but the second part of it is the number of listings at the moment, and it is only to that portion that I want to address one other question.

The Court: If he has any knowledge of the other listings——

Mr. Sterry: That is it exactly. In other [94] words, I only made the statement so that your Honor wouldn't think I was waiving the admissibility of the first part of that stipulation.

Q. Now, Mr. White, either now or during any of the time that you have been secretary of this association, have you ever heard or known yourself of any other persons or concerns, by that I mean corporations or partnerships, doing business under the name of Safeway, other than the plaintiff?

A. To the best of my knowledge, I believe not, sir, until this matter was brought to my attention.

Q. If there has been it has been so slight it didn't register with you? A. That is correct.

Mr. Sterry: Mr. Whelan calls my attention, if your Honor please, to this, and I want to make the same offer of proof with reference to the confusion of the advertisements of the Safeway that have been introduced in evidence that I made to Mr.——

The Court: The advertisements speak for themselves. They are before the court.

Mr. Sterry: Your Honor, I submit to your rul-

(Testimony of S. M. White.)

ing. I am not trying to get your Honor to reverse it. I am simply saying I want to make the same offer now, and I assume your Honor will sustain an objection.

The Court: Same ruling, Mr. Sterry. [95]

Cross-Examination

By Mr. Magid:

Q. Mr. White, where is your office?

A. At 1206 Maple Avenue.

Q. Have you ever had occasion to visit the town of Van Nuys where Safeway Furniture Company is located?

A. I have been in the town on some occasions, not often.

Q. Have you ever been on Van Nuys Boulevard and Victory Boulevard in Van Nuys?

A. Yes, sir.

Q. Have you ever visited the Chamber of Commerce in Van Nuys? A. No, sir.

Q. Have you ever seen the Safeway Furniture Company store in Van Nuys?

A. I have no recollection of it, sir.

Q. You never went into that store, did you, that you know of? A. No, sir.

Q. Did you ever go into a Safeway Store and try to buy any furniture?

The Court: That is not proper cross-examination now. This witness didn't say anything about furniture at all.

Q. (By Mr. Magid): Your members, inde-

(Testimony of S. M. White.)

pendent grocers, [96] which are retailers only, are there any of them by the name of Safeway other than the plaintiff in combination with any other name? A. No, sir, I don't think so.

Q. Is the plaintiff a member of your organization? A. No, sir, they are not.

Q. You know that their name is Safeway Stores, Incorporated, do you not?

A. Yes, I am familiar with the name.

Q. And it is not merely Safeway?

A. That's right.

Q. As secretary of this organization, you know the real name of the plaintiff in this case?

A. Yes, sir.

Q. Did you ever hear the plaintiff referred to as Safeway Stores?

The Court: What difference does it make whether it is Safeway or Safeway Stores? The thing we are interested in here is Safeway. It doesn't make any difference, as far as I am concerned, whether they were known as Safeway Stores or Safeway.

Mr. Magid: I have no further questions of this witness.

The Court: You may step down.

(Witness excused.) [97]

Mr. Sterry: Mr. Carothers, will you take the stand?

JAMES H. CAROTHERS

called as a witness herein by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you spell your last name?

The Witness: James H. Carothers.

The Clerk: Will you spell your last name?

The Witness: C-a-r-o-t-h-e-r-s.

Direct Examination

By Mr. Sterry:

Q. Mr. Carothers, where do you live?

A. At 5210 Village Green, Los Angeles 16.

Q. How long, approximately, have you lived here?

A. I have lived in Southern California since 1920, and in Los Angeles for the major portion of that time.

Q. Mr. Carothers, what is your occupation?

A. I am president of the Food Employers Council, Incorporated.

Q. That is a non-profit organization?

A. Correct.

Q. Its purpose is what?

A. Is to negotiate labor contracts with the unions for the employers and to police those contracts after they [98] have been negotiated.

Q. Is the plaintiff, Safeway Stores, Incorporated, a member of that council?

A. They are, sir.

Q. How long have you been in that organization?

(Testimony of James H. Carothers.)

A. Three and a half years, approximately.

Q. Before that, what was your occupation?

A. I owned a food brokerage business in Los Angeles, operating in Southern California.

Q. How long had you operated that, approximately? A. Five years.

Q. During those five years, due to the statements of the court I am confining my question to one thing, during the time that you have been in business by yourself and for the Food Employers Council, have you ever heard of any other concern, and by concern I include persons, corporations or partnerships, that were operating here under the name Safeway other than the plaintiff?

A. It seems that I have seen the name Safeway on a moving van at some time or other.

Q. Have you ever heard of a company operating and advertising under the name Safeway?

A. Not to my knowledge.

Q. If you did, it is so slight it didn't make any impression? [99] A. Yes, sir.

Mr. Sterry: No further questions.

Cross-Examination

By Mr. Magid:

Q. Mr. Carothers, have you ever heard of the Safeway Furniture Company?

A. The first time I heard of Safeway Furniture Company, to my knowledge, was in Mr. Sterry's office.

(Testimony of James H. Carothers.)

Q. Did you ever hear of Safeway Finance Company? A. Not to my knowledge.

Q. Ever had any dealings with a finance company named Safeway?

A. Not to my knowledge.

Q. Did you ever, by chance, pick up a telephone directory and look under the name of Safeway?

A. Yes, I believe I have looked in the telephone directory for Safeway.

Q. And have you seen any other Safeways besides Safeway Stores listed?

A. Not to my memory, sir.

Q. Did you ever look in the 1955-56 Central Directory under the Safeway listings?

A. No, I believe not, sir.

Q. You believe you have? [100]

A. I believe not.

Q. What telephone directory have you looked at? A. For the Safeway Stores.

Q. Under Safeway?

A. Some years ago I might have looked in the telephone directory when I was in the food brokerage business to find Safeway's number.

Q. In December, 1954, what business were you in?

A. I was in my present position, Food Employers Council.

Q. Did you by any chance look at any of the five directories of the Los Angeles County telephone companies under the name Safeway?

A. Not to my recollection.

(Testimony of James H. Carothers.)

Q. Where was this Safeway moving van that you noticed? Do you recall whether that was in Los Angeles?

A. I couldn't say correctly that it was in Los Angeles. It seems to me that when Mr. Sterry asked me that question that I had at some time in the past seen a moving van with the name Safeway on it.

Q. And it impressed the Safeway so that you could now recall it?

A. No, not definitely, but it seemed to me I had possibly seen it.

Q. You don't have any dealings with unions representing [101] furniture stores, do you?

A. No, sir.

Mr. Magid: I have no further questions.

Mr. Sterry: That's all. Thank you, Mr. Carothers.

The Court: You may step down.

(Witness excused.)

Mr. Sterry: Your Honor please, that concludes our witnesses other than the advertising manager. Would your Honor take the recess now or do you want me to call him?

The Court: We can take the recess now. We will take the morning recess. We will recess until 10 minutes after 11:00.

(Recess.)

The Court: You may proceed.

Mr. Sterry: Will you take the stand?

HENRY J. LUDKE

recalled as a witness herein by and on behalf of the plaintiff, having been previously duly sworn, was examined and testified further as follows:

Mr. Sterry: If your Honor please, I want to make a statement for the record. Yesterday afternoon, as I recollect, the witness testified that the company first started advertising, I mean the plaintiff, under the word Safeway in 1926.

The Court: 1926 or 1936? [102]

Mr. Sterry: 1926. If I remember correctly, your Honor asked him exactly what date, and he said he couldn't testify, and then we had some colloquy in which you discussed this stipulation as to the registration of others under fictitious names, which is not yet in evidence, but which the defendant will undoubtedly offer in evidence. Your Honor made the statement that you had been confused—I wouldn't say confused, troubled by the fact that we had stipulated that there were a great number using the name Safeway, and you didn't see how it could be appropriated.

The Court: I know, but yesterday I was under the impression that the Safeway Stores, Incorporated, used the name in 1955.

Mr. Sterry: I understand.

The Court: Now you tell me it was 1925.

Mr. Sterry: Yes.

The Court: So it seems from this stipulation on file that the Safeway Stores used the name first, according to the stipulation.

(Testimony of Henry J. Ludke.)

Mr. Sterry: That is correct, but, also, as a matter of record, I want to call your Honor's attention to the fact that there is no issue as to our having appropriated that name. The allegation in paragraph XII, which is not denied, is that—reading from page 4, line 28:

"Plaintiff in 1926 adopted the arbitrary, [103] coined and distinctive trade name 'Safeway' for use by its affiliated retail stores and in its various advertisements. At the time of filing this action plaintiff was, and for some time prior thereto had been, using the name of 'Safeway' conspicuously in and around each of its stores and the said name was and is printed in distinctive letters in an oblong sign and against a contrasting background."

There is no denial of that paragraph at all, except, and I read from the answer, paragraph 5, it denies that plaintiff has acquired all the rights of the trade name of Safeway. That is not a denial by any possibility.

The Court: We have a denial in paragraph 9 that reads this way:

"In answer to paragraph XII, defendants deny that they well knew and now know of the rights plaintiff claims to have in the name 'Safeway' and in that connection allege that plaintiff has no more rights to said name than any other person, firm or partnership."

Mr. Sterry: That is not a denial that we appropriated and used that ever since.

The Court: They don't deny the plaintiff

(Testimony of Henry J. Ludke.)

adopted the name in 1926, but the problem yesterday, Mr. Sterry, was here was an allegation that you had adopted the name in 1926, and the stipulation on file said 1955.

Mr. Sterry: Then all I can say is that it was one [104] of those unfortunate typographical errors that should have been caught, but wasn't.

The Court: If it had been caught, we wouldn't be in this argument, because from the stipulation it appears that Safeway used the name first.

Mr. Sterry: I apologize for our inadvertence in that, and I hope I haven't led the court too far astray.

Direct Examination

By Mr. Sterry:

Q. I was just about to ask you, Mr. Ludke, will you look at Exhibits 1, 2 and 3, showing advertisements of the defendant and advertisements of the plaintiff. The defendant's advertisements are first, and then I want to find your advertisements, and I want to ask you about them. Will you turn to the advertisements of the plaintiff store? One or any of them, they are all the same. There may not be one in that paper. I am looking now at Exhibit No. 2. I will show you the advertisement of the plaintiff appearing in there. Look at No. 2. I will ask you——

Mr. Magid: If your Honor please, if Mr. Sterry will use the lectern, I will be able to hear.

Mr. Sterry: I can't use it and show the things to the witness.

(Testimony of Henry J. Ludke.)

The Court: Will you speak a little louder?

Mr. Sterry: I will try to. [105]

Q. I call your attention to that name Safeway in block letters, and I ask you if that is a character of the way the name has been printed for at least five years last past?

Mr. Magid: That is objected to, if your Honor please, on the ground the advertisements speak for themselves.

The Court: The advertisements speak for themselves. There has been no evidence it was not used. Safeway has a distinctive type, I think.

Mr. Sterry: That is what I am asking.

The Court: Objection overruled. You may answer it.

The Witness: We have used Safeway, not only in a signature cut, but also in type.

Q. (By Mr. Sterry): You didn't answer the question. I am asking you if that is typical of the way Safeway has been used? A. Yes.

Q. I ask you, what is that little circle with the S?

A. That is an insignia we have just adopted in the last few years.

Q. How long, approximately?

A. Oh, I would say two or three years. I don't know exactly when we adopted it. We don't always use it, but sometimes.

Mr. Sterry: I think that's all, your Honor. Counsel may cross-examine. [106]

(Testimony of Henry J. Ludke.)

Cross-Examination

By Mr. Magid:

Q. Mr. Ludke, this signature S that you refer to, has that been copyrighted by Safeway Stores?

A. I don't know.

Q. Has any other store, to your knowledge, ever used it?

The Court: Any other Safeway Store?

Q. (By Mr. Magid): Any other store?

A. Not to my knowledge.

Q. You never saw it in any of the advertisements of Safeway Furniture Company, did you?

A. I haven't——

The Court: Just say if you have seen it.

The Witness: No, I haven't.

Q. (By Mr. Magid): You have seen advertisements of Safeway Furniture Company?

A. Only those shown to me.

Q. Have you ever confused any of your advertising with that of the defendant in this case, Safeway Furniture Store?

A. I would say in some cases there is a similarity.

Q. Will you show us from the exhibits where there is a similarity?

A. I would say this Safeway Furniture Company ad here is quite similar to a retail food ad. [107]

Q. Will you show us in the exhibits which retail food ad that is similar to?

(Testimony of Henry J. Ludke.)

Mr. Sterry: May I ask counsel to ask the witness to identify the exhibit that he was speaking of?

The Court: Yes. What exhibit is that?

Mr. Magid: He refers to Exhibit 2.

Q. Now, showing you Exhibit 1, Exhibit 2, or Exhibit 3, or any other exhibit, which food advertisement is similar to the defendant's advertisement?

A. Of course, there are only two or three here, but from the type, it is similar to some that we use in this ad. We have placed ads that this resembles a whole lot more than this.

Q. Show us one.

A. There doesn't happen to be one here, but there is a resemblance between this type and what we use in the Safeway ad.

Q. You then object to the type that was used in the advertisement?

A. I would say the general makeup of the ad.

Q. And if the general makeup of the ad and the type were changed, then there would be no confusion in your mind, at any rate, between Safeway Stores and Safeway Furniture?

Mr. Sterry: One moment, if your Honor please. Every time I try to examine some witness—— [108]

The Court: Just make your objection.

Mr. Sterry: I object to that on the same ground counsel has objected to similar questions of mine.

The Court: What is the objection?

Mr. Sterry: The advertisement speaks for itself.

(Testimony of Henry J. Ludke.)

The Court: Sustained.

Mr. Magid: If your Honor please, that was not the question. The question is if the advertisements were part——

The Court: I think the advertising speaks for itself. I have been in the newspaper business. I know something about advertisements and publications, and so forth and so on.

Mr. Magid: I have no further questions.

The Court: Any other questions?

Mr. Sterry: That's all, if your Honor please.

The Court: You may step down.

(Witness excused.)

The Court: Does the plaintiff rest?

Mr. Sterry: No. You remember I have some questions to ask the defendant in cross-examination. I can introduce a deposition and consider it read in evidence, but I think it will be quicker to get the facts from him.

The Court: I think we better have the defendant testify.

Mr. Sterry: I agree with that, your [109] Honor. Will you take the stand?

MORRIS RUDNER

called as a witness herein by and on behalf of the plaintiff, under the provisions of Rule 43(b) of the Federal Rules of Civil Procedure, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?
The Witness: Morris Rudner.

Direct Examination

By Mr. Sterry:

Q. Mr. Rudner, I could cover all the matters, but I think your counsel will want to, so I will try to avoid that, but there are certain facts I want to bring out from you with reference to our inquiry. First, you are one of the defendants named, are you not? A. Yes, sir.

Q. At the present time you are the sole proprietor of this store? A. Yes, sir.

Q. When the suit was brought, according to the admissions of the answer and what you told me in the deposition, your wife and son were partners with you originally?

A. In a corporation in Reseda, not in this store.

Q. Not in this store? [110] A. No, sir.

Q. Well, you had a corporation which is named as defendant, the Safeway Furniture Company, and that was owned by yourself, your son and your wife. That purchased a store? A. Yes.

Q. What was the name of the store when you purchased it?

A. Reseda Furniture Company.

(Testimony of Morris Rudner.)

Q. You changed the name to what?

A. Safeway Furniture Company, Inc.

Q. Is that store operating now?

A. That store has been out for about a year and a half or so.

Q. It is a corporation actively operating?

A. The corporation is deceased.

Q. It is out? A. It is out.

The Court: You mean it is dissolved?

The Witness: Yes.

Mr. Sterry: If your Honor please, I am perfectly willing to accept that. I don't believe they have had any formal dissolution. I think they failed to pay their franchise taxes.

If your Honor please, under this sworn statement, I want to move to dismiss as to the furniture company without [111] prejudice.

The Court: It may be dismissed.

Mr. Sterry: Without prejudice.

The Court: Without prejudice.

Q. (By Mr. Sterry): Now, when did you acquire any interest in the store at Van Nuys?

A. In April, 1952.

The Court: May I ask a question?

The Witness: Yes, sir.

The Court: What was the name of the store you acquired?

The Witness: Safeway Furniture Company.

The Court: From whom did you get it?

The Witness: Frank Keefer and Sam Sims

(Testimony of Morris Rudner.)

owned it, and I bought it with them. They had the name there when I bought it with them.

The Court: You just became a partner?

The Witness: That's right, a general partner.

The Court: A general partner?

The Witness: That's right. They were limited partners.

The Court: Do you know of your own knowledge how long the Safeway Furniture Company had been operating out there in Van Nuys?

The Witness: I understand between a year or two. [112] That's all I know.

Q. (By Mr. Sterry): How long did you continue as a general partner before you bought out the two other partners? A. One year.

Q. One year?

A. One year, sir. By April 1, 1953, I bought the other two out.

Q. You bought the other two out?

A. That's right.

Q. When you bought them out, in your opinion, did the name Safeway Furniture have any value at all?

Mr. Magid: That is objected to, your Honor, as being argumentative.

The Court: Overruled. I guess he had some opinion or he would have changed the name. You may answer.

Read the question.

(Question read.)

(Testimony of Morris Rudner.)

The Witness: They had been operating there for two years, and I would think it would have.

Q. (By Mr. Sterry): Referring again for the moment to the question of no one else being a partner there, let me read your deposition taken some time ago, from page 17.

Mr. Magid: What page is that, Mr. Sterry?

Mr. Sterry: Reading from page 17:

"Q. Since then you have been operating that as your [113] own business?

"A. That is right.

"Q. How about your son; has he any interest in the business with you?

"A. No, sir. May I explain?

"Mr. Magid: No, that's all.

"The Witness: All right.

"Mr. Sterry: Let him explain. I'd like to get the story.

"Mr. Magid: Just answer the question.

"The Witness: All right.

"Q. (By Mr. Sterry): Go ahead.

"A. I'll tell you how he came in and how he got out.

"Q. All right.

"A. He got married and I thought he would settle down if I would give him a little partnership. It didn't last very long, so when they split up and got divorced it was over. That's what a father tries to do."

Q. Did you so testify? A. Yes, sir.

(Testimony of Morris Rudner.)

Q. Then he was a partner with you for a short period of time?

A. A short period of time. [114]

Q. But at the present time neither he nor your wife have any interest in this business?

A. That's right, sir.

Q. You are the sole proprietor of it?

A. Yes, sir.

Mr. Sterry: Then, if your Honor please, I will move to dismiss the other two Rudners without projudice.

The Court: They may be dismissed.

Mr. Sterry: Without prejudice?

The Court: How about the John Does?

Mr. Sterry: I dismissed as to them yesterday. That is, the dismissal is without prejudice, your Honor?

The Court: Without prejudice.

Q. (By Mr. Sterry): Now, I want to read your deposition to you at page 26. Before I read that to you, how long before you bought an interest in this store had you lived in Los Angeles?

A. Approximately?

Q. Yes. A. About six or seven years.

Q. Six or seven years. At the time you bought in, you knew of the plaintiff corporation, the Safeway Stores, Incorporated, didn't you?

A. I knew of Safeway Stores. I didn't know whether they were incorporated. [115]

Q. You didn't know it under any other name than Safeway, is that correct?

(Testimony of Morris Rudner.)

A. Safeway Grocery is what it went by.

Q. You knew, didn't you, that they had built up a very high and valuable good will under that name?

Mr. Magid: If your Honor please, I think we are definitely getting into the realm of argument.

The Court: Make your objection.

Mr. Magid: I object to the question on the ground it is argumentative.

The Court: Objection sustained. I will take judicial knowledge, Mr. Sterry, that Safeway has built up a valuable asset of good will in this community, extending back over the years 1952, 1953, and before.

Mr. Sterry: I understand, but I still think we have a right to show he knew that. One of our charges is that he adopted this name just for the purpose of trading on it.

The Court: He didn't adopt the name, Mr. Sterry. The name was there. He bought it.

Mr. Sterry: Well, all right, even if he bought it, under the decisions, that is enough.

The Court: He didn't adopt the name. I might ask the witness this question: At the time you bought into this Safeway Furniture Store, you had patronized Safeway Grocery [116] Stores before, hadn't you?

The Witness: Yes, sir, and I do today.

The Court: You still do today?

The Witness: Yes.

The Court: Good stores?

(Testimony of Morris Rudner.)

The Witness: Yes, sir. I told Mr. Sterry they have the best meat. My wife buys all her meat there.

Q. (By Mr. Sterry): Mr. Rudner, I am going to read to you from page 25, starting at line 25, of your deposition. Will you look at that? I will ask Mr. Magid and you to please correct me if I inadvertently omit a word. I sometimes do in reading:

"Q. You allege in your answer that you bought the name and that is a question of law which I am not going to argue with you. Personally, as I understand the situation, there was a partnership running this store out here under that name?

"A. That is right.

"Q. You bought an interest in it?

"A. That is right.

"Q. And then the other partners retired?

"A. That is right.

"Q. All right. Now, what I am asking is not as to your legal right to use that name. That's what this lawsuit is about and Mr. Magid and I probably won't [117] agree. That's why we are having a suit. I am asking you if you thought that 'Safeway' had any special value to you as a furniture company? A. Not at that time.

"Q. It didn't? A. No.

"Q. Why did you continue to use?

"A. Because the sign was there. We had a big electric sign. The sign and all the stationery and

(Testimony of Morris Rudner.)

everything like that, I just continued to keep on using it.

"Q. Have you the same sign there now?

"A. Yes, sir.

"Q. Your counsel has very graciously furnished me a photograph of a sign. We have already had that, but I will show them to you and ask you if that is the electric sign that you had?

"A. Yes, sir.

"Q. Your reason for not wanting to change was simply the cost of changing that name?

"A. That is right, yes."

Did you so testify?

A. What page are you on now? You are reading kind of fast.

Q. Did you so testify? [118] A. Yes.

Q. That was true, was it not? A. Yes.

The Court: May I ask a question?

The Witness: What page is that?

The Court: Was this sign, the Safeway sign, on the building when you bought it?

The Witness: Yes, sir. The big electric sign was there, and the Safeway sign on the building, also.

The Court: It was there when you bought?

The Witness: Yes, sir.

Mr. Sterry: We have this picture, your Honor, that was attached to the deposition. I want to offer that in evidence as our next exhibit.

The Court: It may be received.

Mr. Magid: No objection.

(Testimony of Morris Rudner.)

The Court: It may be received as Exhibit 6 in evidence.

The Clerk: Exhibit 6.

(The photograph referred to was marked as Plaintiff's Exhibit No. 6 and received in evidence.)

The Court: You have only the one store now, don't you?

The Witness: That's all.

The Court: Just one store. [119]

Q. (By Mr. Sterry): Will you look at the exhibits before you? I think they are the newspaper exhibits. Is it 1, 2 and 3?

The Clerk: That's right.

Q. (By Mr. Sterry): Look at the advertisements there. Those were inserted with your authority, were they not?

A. Some are and some aren't.

Q. Are you——

A. May I answer the question?

Q. Go ahead and give any explanation you want.

A. If I am not there, my manager puts them in.

Q. I don't care whether it is you or your manager. A. Yes. These are my ads.

Q. I don't mean you personally, but you or your manager authorized those ads?

A. Yes, that is my ad.

Q. You advertised generally. We have quite a number of other similar ads, but I can't see the necessity of adding anything to the record by put-

(Testimony of Morris Rudner.)

ting in six or seven more of the same kind. You paid for all the ads, did you not? A. Yes, sir.

Q. What papers did you advertise in?

A. The green sheet, the Valley paper. I don't know whether it is Valley Sun. It has been quite a while since I advertised in it. The San Fernando paper. At the time of [120] the deposition I was not sure what the papers were, you know, that I advertised in. San Fernando paper.

Q. Mr. Rudner——

A. And I was on TV—excuse me—not TV, radio.

Q. You know that similar advertisements were carried before you bought in as a partner?

A. Oh, yes, sir. The same ads were run before I went in there.

Q. Have you been able to find any that were run like that before you went in?

A. No. I was never asked to. I adopted the idea the way that the store was going and I just kept on going that way.

Mr. Sterry: Now, if your Honor please, that's all, except we have one stipulation.

The Court: Just a minute, Mr. Sterry.

Mr. Sterry: I beg your Honor's pardon.

The Court: Counsel is entitled to cross-examine, if he has anything. Do you want to cross-examine this witness at this time on the matters that have been gone into by Mr. Sterry?

Mr. Magid: Just one question.

(Testimony of Morris Rudner.)

Cross-Examination

By Mr. Magid:

Q. You continued the same type of advertising that Mr. [121] Keefer and Mr. Sims had initiated before you had gone into the business?

A. Yes, sir.

Q. While you were with them, the same type of advertising was continued? A. Yes, sir.

Q. And you continued the same thing after you bought them out? A. Yes, sir.

Q. Now, today, do you have the same type of advertising, these display ads? A. Yes, sir.

Mr. Magid: I have no further questions.

Mr. Sterry: One thing Mr. Whelan calls my attention to. May I see the original deposition? I think there is another exhibit there we want to offer. If your Honor please, I apologize, but I thought this had been admitted in the request for admissions. It is in the deposition.

Redirect Examination

By Mr. Sterry:

Q. I show you the Exhibit A attached to your deposition, a letter and a notice from myself to you. You received that in due course of mail?

Mr. Magid: What is it you are referring to, Mr. [122] Sterry?

Mr. Sterry: The letter you produced that I wrote to him shortly before the suit was brought.

(Testimony of Morris Rudner.)

Mr. Magid: The letter I produced? You asked me to admit, and this letter.

Mr. Sterry: When we took his deposition, he said he didn't get that, but he got one very much like it. That is what misled me. I thought it was in the admissions.

The Witness: I know I got one letter. I don't remember which it was.

The Court: You did get a letter from Mr. Sterry, didn't you?

The Witness: Yes, I did, your Honor.

Mr. Sterry: You will stipulate that is the letter you produced?

Mr. Magid: Yes.

Mr. Sterry: It is stipulated, rather than read his deposition, this is the one he produced.

The Court: All right.

Mr. Sterry: I will ask to have that marked.

The Court: Better have it marked as Plaintiff's Exhibit 7 in evidence.

Mr. Sterry: Plaintiff's Exhibit 7.

The Court: It can be marked without taking it out of the deposition, can't it? [123]

Mr. Sterry: I think it can be.

The Clerk: In evidence, Plaintiff's Exhibit 7.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 7.)

Q. (By Mr. Sterry): Your statement that the advertisements were put in by either you or the

(Testimony of Morris Rudner.)

manager goes to all the advertisements in the various papers, including those that are included in our request for admissions?

A. I don't understand you.

Q. I say in our request for admissions, we had a number of advertisements, and all the newspaper advertising had either your authorization or that of your manager? A. Yes, sir.

Mr. Sterry: If your Honor please, I don't know whether it is necessary or not to introduce in evidence a stipulation, but we have here a stipulation as to certain facts.

The Court: I assume that when the parties stipulate, it is then in the record. It is not necessary to introduce it. It is part of the record.

Mr. Sterry: I think your Honor is correct, but there are some decisions that question that.

The Court: All right. If you want to introduce it in the record, I have no objection.

Mr. Sterry: Purely as a matter of precaution, I [124] would offer to introduce in evidence the stipulation of the parties of May 15, 1956.

The Court: It may be admitted in evidence.

Mr. Magid: I will object to that, your Honor, until such time as I am given an executed copy of that stipulation. I signed one and have never had the courtesy of having one given to me, so I don't know whether there is such a stipulation.

The Court: I have a stipulation in the file. It is signed by the parties. It has been approved.

(Testimony of Morris Rudner.)

Mr. Sterry: If your Honor please, if Mr. Magid didn't get a copy——

The Court: That is neither here nor there. I will order the stipulation to be admitted in evidence.

The Clerk: Exhibit 8.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 8.)

Mr. Sterry: I will furnish him one.

The Court: Now, Mr. Sterry, there is one other question. I notice in going through the files there was a request for admissions.

Mr. Sterry: Yes.

The Court: The admissions have never been made, but I understood that the answers had been waived because they were covered by the deposition. [125]

Mr. Sterry: No. If your Honor please, in the deposition Mr. Magid—and I can read that portion—said he would admit certain things, and there is a stipulation as to what is admitted. Where is that stipulation?

The Court: Of course, neither party has followed the rules. The rules evidently are not to be read relative to federal procedure. The rules of our local court say that when you make a request for admissions, they should be answered, and not only that, but the answering party should put down the admission and answer together. From looking at

(Testimony of Morris Rudner.)

this, I can't tell what it is. I don't know what it means.

Mr. Sterry: If your Honor please, I probably should have insisted on Mr. Magid following the rule. I was going to offer in evidence or have Mr. Whelan put in evidence the admissions with this stipulation. Otherwise, I shall have to examine the witness at length on each admission.

The Court: My understanding from what you said yesterday was that the answers had been waived because they had been covered in the deposition.

Mr. Sterry: No, no. Well, if your Honor please, that is probably true. I probably didn't speak with absolute accuracy. Mr. Magid said, "I want to save myself a lot of work. I can tell you which of these I admit and which I deny," and he afterwards reduced that to a stipulation which is filed. If your Honor is not willing to follow that, I will have to [126] take up each one of them.

The Court: I am perfectly satisfied. I thought maybe you should introduce the deposition.

Mr. Sterry: All right. I will introduce the deposition in whole.

Mr. Magid: No objection.

The Court: The deposition may be received in evidence.

The Clerk: Exhibit 9.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 9.)

(Testimony of Morris Rudner.)

Mr. Sterry: Also, I want to introduce our stipulation of March 15th, approved by yourself.

The Court: March 15th? I have one on May 15th.

Mr. Sterry: That's it, May 15th. There are two, I think, on May 15th. I think the other one——

The Court: There was only one dated May 15th. Well, there are two of them.

The Clerk: Which is the one that is first? I want to mark the first one.

The Court: This is 8.

The Clerk: And the other one will be No. 10.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 10.)

Mr. Sterry: I will ask Mr. Whelan to read to your Honor the admissions that are requested and admitted. He can pass any ones that have been denied. We have those marked. If we read that into the record, it would make it clearer and probably be of a little more assistance to your Honor.

The Court: All right.

Mr. Whelan: Request No. 1, which is admitted by the stipulation:

"Plaintiff was, as of the date of the filing of the complaint herein and is now, a corporation duly organized and existing under and by virtue of the laws of the State of Maryland, and was as of that date and is now a citizen of the State of Maryland."

(Testimony of Morris Rudner.)

Did your Honor want all of that read?

The Court: No. Just read the admission and state after denied or admitted.

Mr. Sterry: Certain of them he has partially admitted and partially denied. He can indicate that.

Mr. Whelan: Request No. 2, I will read in its entirety. Part of that is admitted and part denied:

"Defendant Safeway Furniture Co., Inc., was as of the date of the filing of the complaint herein and is now a corporation duly organized and existing under and by virtue of the laws of the State of California, and was as of that date and is now a citizen of the State of California."

That it is now a corporation and is now a [128] citizen is denied. Otherwise, it was admitted, but that becomes irrelevant in view of the dismissal of the corporation from the suit.

Mr. Magid: If your Honor please, for the sake of brevity, since your Honor has indicated we must finish today, inasmuch as the deposition in whole is now part of the record, all that Mr. Whelan is about to read is in the deposition.

Mr. Whelan: The only point in reading, your Honor, I think, was to give you a full view of just what had been admitted at this time.

The Court: I have already gone over your admissions and I have already gone over the stipulations, so I know what you have admitted and what you have denied. If you are trying to educate me, you are wasting your time. If you are trying to make a record, that is all right.

(Testimony of Morris Rudner.)

Mr. Sterry: Your Honor please, I think the record is perfectly clear in the deposition and the stipulations and the admissions are there. I was under the impression from your Honor's remark the other day—it is my error—you were uncertain as to what had been admitted. If you are certain as to that, I agree it is a perfect waste of time.

The Court: I was just calling your attention to the fact that neither counsel in this case has followed the rule, that's all.

Mr. Sterry: If your Honor please, I don't [129] think that we didn't follow the rule. We contended that Mr. Magid was relieved from that.

We rest, if your Honor please.

The Court: I notice it is nearly 12:00 o'clock.

Mr. Sterry: If your Honor please, Mr. Whelan calls to my attention that we had information, and I don't want to state it, but we had information that there are probably some advertisements at an earlier date than have been indicated under the name Safeway, and we are having that looked up. If we find that is true, we would want to introduce those papers.

The Court: All right. If you find them, you can put them in the record. It is nearly 12:00 o'clock. We will recess now until 2:00 o'clock this afternoon.

(Whereupon, a recess was taken until 2:00 o'clock p.m. of the same day.) [130]

Friday, May 25, 1956—2:00 P.M.

Mr. Sterry: If your Honor please, we have the early ads. It will take about two minutes.

The Court: If you have got them, put them in.

Mr. Sterry: If your Honor please, we found out about these late last night or early this morning. The witness has the official volume of the Herald-Express and a photostatic copy of the Times and has promised to return them to them. I don't really care which one we use. They are both exactly the same.

The Court: I am interested in the date as much as anything else.

Mr. Sterry: The date is the same.

The Court: The date is the same. All right.

Mr. Magid: You will let me look at them, first, won't you, counsel?

The Court: Yes. Show them to the defendant.

Mr. Sterry: I beg your pardon. If you will step over here, I will show them to you.

HENRY J. LUDKE

called as a witness herein by and on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as [131] follows:

Redirect Examination

(Continued)

By Mr. Sterry:

Q. Mr. Ludke, you have in front of you a large bound book. Did you get that from the—well, what is it?

A. I got that volume from the Herald, Los Angeles Herald. It was the Los Angeles Herald at that time.

Q. On the page you are showing is an advertisement of Safeway Stores on March 17, 1925. I show you a photostat of the one appearing in the Los Angeles Times of the same date.

A. Same date, yes.

Q. Did you compare that with the one in the Times?

A. Yes. I saw the original at the Times office.

Mr. Sterry: If your Honor please, we have promised to return this. I will offer this one in evidence for the time.

The Court: The photostat?

Mr. Sterry: Yes.

The Court: It may be received in evidence.

The Clerk: Exhibit 11.

(The document referred to was received in evidence and was marked as Plaintiff's Exhibit No. 11.)

(Testimony of Henry J. Ludke.)

Mr. Sterry: I think the record is clear, if counsel will stipulate, that substantially, so far as the wording is [132] concerned, it is the same.

The Court: What difference does it make whether it is in one or a dozen newspapers? The thing I am interested in is the date.

Have you any questions of this witness?

Mr. Magid: No questions.

The Court: You may step down. You may return the volume to the Herald-Express.

(Witness excused.)

Mr. Sterry: We rest.

The Court: You may proceed.

Mr. Magid: For the defendant, Morris Rudner, I move for nonsuit on the ground the plaintiff has failed to prove a prima facie case.

The Court: Well, we don't have any motion for nonsuit in federal court. However, I will consider your motion as a motion to dismiss. It is denied.

Call your first witness.

Mr. Magid: Mr. Rudner, will you take the stand, please? You have already been sworn.

MORRIS RUDNER

recalled as a witness herein in his own behalf, having been previously duly sworn, was examined and testified as follows: [133]

Direct Examination

By Mr. Magid:

Q. Mr. Rudner, have you ever had any people come into your store and inquire as to whether you were a subsidiary or connected in any way with the Safeway Stores, the plaintiff in this action?

A. No, sir.

The Court: Will you speak up so that counsel can hear you?

The Witness: No, sir.

Q. (By Mr. Magid): Do you sell any items, such as mops, waxes, brooms, or other household accessories, other than furniture? A. No, sir.

Q. In one of the advertisements in either Plaintiff's Exhibits 1, 2 or 3, there is a step stool shown as part of a kitchen set. Do you now sell any such item? A. No, sir.

Q. Have you discontinued the sale of breakfast sets as such, with the step stool and the other accessories shown in that advertisement?

A. Yes, sir.

Q. Have you ever sold any outdoor furniture?

A. No, sir.

Q. Have you ever sold any TV trays? [134]

A. No, sir.

Q. Clothes baskets? A. No, sir.

Q. Wood card tables? A. No, sir.

(Testimony of Morris Rudner.)

Q. Outdoor chairs? A. No, sir.

Q. Rockers?

A. Only big living room rockers that go with the living room suites.

Q. Yacht chairs? A. No, sir.

Q. TV hassocks? A. No, sir.

Q. Metal lawn tables? A. No, sir.

Q. Two-tier hostess carts? A. No, sir.

Q. Ironing boards? A. No, sir.

Q. Folding trays? A. No, sir.

Q. Wrought iron furniture?

A. Living room suites and dinette sets.

Q. Did you ever sell any waste baskets? [135]

A. No, sir.

Q. Magazine racks? A. No, sir.

Q. Corner shelves? A. No, sir.

Q. Round wall shelves? A. No, sir.

Q. Ash trays? A. No, sir.

Q. TV tables?

A. Only with table model TVs.

Q. Aluminum chairs? A. No, sir.

Q. Do you intend to sell any of those items other than the ones you have answered yes to?

A. No, sir.

Q. Has anybody ever come in and asked you for any of those items, so far as you know?

A. Not that I can remember.

Q. Have you ever told any customers or potential customers that you were connected with Safeway Stores, Incorporated, the plaintiff in this case?

A. No, sir.

(Testimony of Morris Rudner.)

Q. Has anybody ever come into your store and asked you if you were affiliated with the plaintiff, connected with the [136] plaintiff, Safeway Stores?

A. No, sir.

Q. Did anybody ever ask you if the plaintiff was sponsoring the use of that name in your store?

A. No, sir.

The Court: Did anybody come in and ask you where your grocery department was?

The Witness: No, sir. I have furniture all over the place and signs all over the inside.

Q. (By Mr. Magid): Have you used the name Safeway Furniture for the sole purpose of trading upon the good will of the plaintiff in this case?

Mr. Sterry: I object to that on the ground it is leading the witness.

The Court: Isn't that your charge?

Mr. Sterry: That is the charge.

The Court: Doesn't he have a right to deny it? Objection overruled. You may answer.

Q. (By Mr. Magid): Have you ever used the name Safeway Furniture Store or Safeway Furniture Company for the sole purpose of trading upon the good will of the plaintiff, Safeway Stores?

A. No, sir.

Q. Has anybody ever told you that because of the way you conduct your business or because of the services you have [137] rendered, that they believe that the plaintiff's business conduct and services has fallen into disrepute?

(Testimony of Morris Rudner.)

Mr. Sterry: Now, one moment.

The Court: Objection sustained.

Mr. Sterry: That is objected to.

Mr. Magid: I am assuming, your Honor, we need not go into the conduct in the Reseda store, that being a corporation.

The Court: That's right. You don't have anything to say about that.

Mr. Sterry: I think regardless of whether that was good or bad, that is now moot. It has gone out of business.

Q. (By Mr. Magid): Mr. Rudner, I show you what appears to be something torn out of a newspaper, and ask you if you can identify that for me.

A. Yes, sir.

Q. Where did you get that scrap of paper from?

A. Out of the Examiner of May 20th.

The Court: Of what year?

The Witness: 1956.

Q. (By Mr. Magid): Can you tell me whether you have any connection, directly or indirectly, or whether anybody connected with you or your family, as a servant, agent, or employee, has any connection whatsoever with the Safeway that is mentioned in that advertisement? A. No, sir. [138]

Mr. Magid: I offer this as defendant's exhibit, your Honor.

The Court: It may be received in evidence as Defendant's Exhibit A.

The Clerk: Defendant's Exhibit A.

(Testimony of Morris Rudner.)

(The advertisement referred to was received in evidence and marked as Defendant's Exhibit A.)

Q. (By Mr. Magid): Mr. Rudner, with the exception of two instances, since the filing of this action have you caused to be inserted in any newspapers any of the display advertisements of this type? This is a display advertisement, is it not?

A. Yes.

Q. Have you caused to be inserted any such advertisements?

A. Would you restate that, sir?

The Court: Read the question.

(Question read.)

The Witness: Since when?

Q. (By Mr. Magid): Since the filing of this suit.

The Court: What difference does it make as to what happened since the filing of the suit? It doesn't make any difference as far as I know whether he has or hasn't.

Mr. Magid: I want to check the dates. [139]

Q. What type advertising do you do now?

Mr. Sterry: That is objected to as incompetent, irrelevant and immaterial.

The Court: I think it is immaterial as to what kind of advertising he does. Sustained.

Mr. Magid: The plaintiff is asking for a permanent injunction.

(Testimony of Morris Rudner.)

The Court: For the use of the word Safeway.

Mr. Magid: No, and in the alternative, page 14, line 32, he is asking for an alternate injunction against using any name Safeway in such a way or manner as to imitate the word Safeway.

The Court: It has nothing to do with the case. I am not going to tell you how he can dictate to the newspaper what type they are going to use, whether dark space, light space, or not.

Mr. Magid: That is what the plaintiff is asking for.

The Court: I can't do that.

Mr. Magid: In that case, your Honor, we have no further questions.

Mr. Sterry: May I ask just one or two questions?

The Court: Yes.

Mr. Sterry: They are probably not cross-examination. They are matters I should have interrogated the witness about [140] before.

Cross-Examination

By Mr. Sterry:

Q. The first one will be the advertisement of the Safeway Furniture on Broadway. That company, you know, has gone out of business, don't you?

A. It has been sold to Friendly Furniture and they are operating Safeway right next door.

Q. But they are under another corporate name?

A. No. Safeway Furniture Company is what they are still under.

whether they are in the furniture business or they are in the repair business or they are in the delivery business. It doesn't make any difference, unless there has to be competition, and this case, the Phillips case, indicates that there doesn't have to be competition.

Mr. Sterry: The what case? [143]

The Court: The Phillips case indicates that there doesn't have to be competition.

Mr. Sterry: If your Honor please, it is very embarrassing to an attorney to try to ask to argue something the court says he is not interested in, but if you can give me about 30 minutes to point out other issues which I think your Honor has overlooked entirely and which have been sustained by the Ninth Circuit——

The Court: Go ahead. I will give you until 4:00 o'clock.

Mr. Sterry: Well, I will be very brief, and if your Honor wants briefs filed, we shall be very glad to do so.

The Court: It doesn't make any difference to me, because I look up my own law, but if you have any cases you want me to examine that you think I might overlook, I will be glad to examine them. But I am not requiring you to file a brief. I am giving you the opportunity to file one.

Mr. Sterry: I will be very glad to. But, if your Honor please, I would like to discuss with you now the matter orally, so if I don't make myself clear your Honor can put any questions you want.

The Court: Go ahead.

(Argument of counsel.)

Mr. Magid: The defendant asks leave to reopen the case for the purpose of offering in evidence the stipulation [144] and order. Do you have the date?

The Court: It was filed May 21.

Mr. Magid: Filed May 21, which refers to the listings——

Mr. Sterry: The time of the signature is May 17th.

The Clerk: This one is May 16th, signed by you.

Mr. Magid: Dated May 16, 1956, and filed with this court May 21, 1956.

The Court: Let the record show that the motion is objected to by the plaintiff.

Mr. Sterry: It is objected to on two grounds. It is a statement that there have been that many number of fictitious names filed, and that doesn't show they have ever been used. Secondly, it is immaterial whether other persons have used it or not. If your Honor wants to overrule the objection, then the stipulation is in evidence.

The Court: The objection is overruled. The case will be reopened.

Mr. Magid: Thank you.

The Court: The affidavit will be admitted in evidence.

The Clerk: Exhibit B.

(The document referred to was received in evidence and marked as Defendant's Exhibit B.)

(Further argument by counsel.) [145]

The Court: The court will now stand in recess.

(Whereupon, at 4:00 o'clock p.m., Friday, May 25, 1956, an adjournment was taken.) [146]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 27th day of July, 1956.

/s/ S. J. TRAINOR,
Official Reporter.

[Endorsed]: Filed August 16, 1956. [147]

PLAINTIFF'S EXHIBIT No. 9

In the United States District Court, Southern District of California, Central Division

No. 17553—HW

SAFEWAY STORES, INC.,

Plaintiff,

vs.

SAFEWAY FURNITURE COMPANY, INC., a Corporation, et al.,

Defendants.

Deposition of Morris Rudner, taken by the plaintiff on Thursday, March 22, 1956, commencing at 2:00 p.m., at the offices of Gibson, Dunn & Crutcher, 634 South Spring Street, Los Angeles, California, pursuant to notice on file, before Horce E. Snyders, a Notary Public in and for the State of California.

Appearances:

For the Plaintiff:

GIBSON, DUNN & CRUTCHER,
NORMAN S. STERRY, ESQ.,
HENRY F. PRINCE, ESQ.,
FREDERIC H. STURDY, ESQ.,
IRA C. POWERS, ESQ.,
JAMES R. HUTTER, ESQ., by
NORMAN S. STERRY, ESQ.,
MARTIN E. WHELAN, JR., ESQ.,

For the Defendants:

WILLIAM B. MAGID, ESQ.

Plaintiff's Exhibit No. 9—(Continued)

MORRIS RUDNER

called as a witness by the plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Sterry:

Q. Mr. Rudner, you are one of the defendants in this case? A. I am the defendant.

Q. Well——

A. I guess that's what you want.

Q. You say "the." There are three of them named, but you are a defendant? A. Yes.

Q. Where do you live, Mr. Rudner?

A. 19400 Collier, Tarzana.

Mr. Sterry: Would you read that answer, please?

(Record read.)

Q. (By Mr. Sterry): Where is Tarzana?

A. Right outside of Van Nuys.

Q. Oh, yes.

A. About eight or nine miles.

Q. That's a new one on me. I never heard of it.

A. Well, there is Encino and then Tarzana.

Q. Have you ever given a deposition before, Mr. Rudner? [2*] A. No, sir.

Q. Well, then, I think it is proper to explain to you under the Federal Rules and also under our State procedure any party has a right of taking

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Plaintiff's Exhibit No. 9—(Continued)
(Deposition of Morris Rudner.)

deposition of the opposite party for purposes of discovery. You are testifying under oath the same as though you were in court. Mr. Snyders takes down here on his machine any questions which I ask and any answers that you give. After that he transcribes it. Then you will have a chance to read it and make any corrections that are necessary to make it speak the truth, but if you correct it your opponent at the time of trial has the right to call your attention to the corrections and to make any comments on them that he thinks fit or proper either before the judge or the jury—in this case it isn't the jury—so it is rather important for you to understand the questions before you answer them. If some questions are asked that you don't understand, say so and I will explain it. If I don't, why, your counsel will explain it. A. All right.

Q. All we want are the facts about which you are interrogated. If at any time I should drop my voice so you don't hear, or if I speak rapidly, don't hesitate to say so. A. O.K., sir.

Q. With that explanation, let me ask you what is [3] your age?

A. I have to laugh because my wife and I are always kidding, but I'll be fifty-four September the 28th.

Q. You have read the complaint in this suit, and the answer?

A. My attorney read it for me. I have complete confidence in him. I have read it, too, yes.

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

Q. All right. Then you know in general what it is about? A. Yes, sir.

Q. You know that generally the plaintiff, which I will refer to as Safeway Stores to save confusion, is challenging your right to use the name "Safeway Furniture Company." That is the issue in this case. Now, Mr. Rudner, please don't nod because the reporter can't take a crick of the neck.

A. All right. This is the first time so you will have to forgive me for that.

Q. Let me tell you that is a very, very common habit of all witnesses, either in depositions or in court. Sometimes I have heard reporters say they get the crick of the neck but he isn't supposed to do it. A. O.K., sir.

Q. So, Mr. Rudner, the store you are operating now is situated where?

A. 6416 Van Nuys Boulevard, in Van Nuys. [4]

Q. When did you start operating it?

A. Do you have the dates down there? You looked them all up.

Mr. Magid: Yes.

The Witness: I bought it from a concern that had it.

Mr. Magid: Just a minute. Let me get it for you. This is off the record.

(Discussion outside the record.)

The Witness: April 3rd, 1952.

Plaintiff's Exhibit No. 9—(Continued)
(Deposition of Morris Rudner.)

Q. (By Mr. Sterry): I thought you started to say that you bought it from someone.

A. Well, there were partners in there at the time and I bought in with them and formed a limited partnership.

Q. Let me ask you a few questions. You say you bought in with them. "Them" of course could mean anybody. Whom do you mean?

A. Frank Kiefer and Sam Simms, who owned the store.

Q. How long had that store been operating, do you know? A. Before that?

Q. Yes. Just approximately?

A. It might be a year, it might be longer. I don't know.

Q. Or it might be a little less?

A. Yes. I'd say it's about two years. We looked up the dates. June 22, 1950. [5]

Q. That is from information your counsel is showing you? A. Yes, sir.

Q. That isn't of your own knowledge but that is your approximate idea? A. Yes.

Q. It was being operated under what name?

A. Safeway Furniture Company.

Q. Before that had you been in business at all?

A. No, sir.

Q. What was your occupation?

A. I worked for furniture stores.

Q. In what capacity? A. Salesman.

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

Q. What was the name of these people who were operating the store?

A. Frank Kiefer and Sam Simms.

Q. Frank Kiefer and Sam Simms?

A. That is right.

Q. You say you bought in with them. Was it an equal partnership when you bought in, or did you buy the controlling interest, or what?

A. They were the limited partners and I was a general.

Q. That was on what date?

A. April 3rd, 1952 [6]

Q. Before that you had not been in the mercantile business at all? A. Not for myself, no.

Q. You say not for yourself. You mean you hadn't been——

A. In any kind of business myself.

Q. You had simply been working as a salesman?

A. I had been a salesman all my life.

Q. Now, you bought in with them and at the time you bought you formed a limited partnership, did you? A. Yes, sir.

Q. Have you the partnership articles with you?

A. No, sir.

Mr. Sterry: Can you furnish them, Mr. Magid?

Mr. Magid: We don't have them. I imagine they must be with the attorneys who formed that partnership.

Mr. Sterry: Who?

Mr. Magid: I was not the attorney.

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

The Witness: I guess we could get them.

Mr. Magid: Was Frank Kiefer's cousin an attorney?

The Witness: Yes.

Mr. Magid: He would have them.

Mr. Sterry: I don't want to go to any more trouble or expense for either of us than necessary. I don't want to ask him secondary evidence unless it is necessary. I would like to know what the articles required and I don't like to [7] ask a businessman that if we can get the articles.

Mr. Magid: I imagine they must be filed with the County Clerk because they did have an attorney.

Mr. Sterry: Your idea that they must have been filed may be correct and it may not, because you and I know that a lot of people don't do things they should do.

Mr. Magid: The certificate is filed.

Mr. Sterry: I know, but the certificate won't show the partnership articles.

Mr. Magid: No, as I say, the certificate is filed so I imagine the articles are filed. At any rate, we don't have a copy of the articles.

Q. (By Mr. Sterry): Didn't you have the articles when you bought in as a general partner?

A. What?

Mr. Magid: The contract you made with Frank and Sam.

The Witness: Yes. My accountant has that.

If I may say something here, I have an account-

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

ant that has been with me ever since I have been open, and he takes care of all my books just like Mr. Magid takes care of all my attorney work.

Q. (By Mr. Sterry): If he has it you ought to be able to furnish us a copy of it.

A. I would be happy to.

Q. You say you were the general partner and these two gentlemen were limited partners. Of course, we know [8] that limited partners have limited liabilities. I don't want to examine you really about what they are called because my experience has been that laymen very often misstate the facts.

A. Yes.

Mr. Sterry: I would like to have this understanding, Mr. Magid, that they will furnish us a copy of it and then I can advise you whether I want to examine him on it or not.

Mr. Magid: I will put it this way, Mr. Sterry: If Mr. Rudner's accountant has a copy of the articles we will be very happy to furnish you with a copy. Otherwise I wouldn't know whether they are because I have never seen them. I think we should bring out the fact that at the time you bought into this partnership or into this business they had been doing business under the same name at the same address. Is that correct?

The Witness: Yes.

Q. (By Mr. Sterry): Since about when?

A. 1950.

Mr. Magid: Let me see what the answer says

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

here. All we know is that on June 22, 1950, they filed a certificate of doing business under the name of Safeway Furniture Company.

Q. (By Mr. Sterry): You don't know whether they operated under that name? [9] A. No.

Q. Where are they located now?

A. Well, the one man sold the Safeway Furniture Company in Los Angeles, sold it to a fellow who was about to lose it, and I had a lot of trouble with their bills coming to my place. Anyway, that is neither here nor there.

Q. That is not concerned with this.

A. No.

Mr. Magid: This is off the record.

(Discussion outside the record.)

Q. (By Mr. Sterry): All I am asking is where those two people are so if we can't get the information from Mr. Rudner we can take their depositions. That's all I want.

A. Frank is up in San Jose. I don't know what his address is.

Q. Frank who? A. Frank Kiefer.

Mr. Magid: Is he in business there?

The Witness: Yes.

Mr. Magid: Do you know the name of the store?

The Witness: No.

Q. (By Mr. Sterry): Who was the other man?

A. Sam Simms, and he has the Savon Furniture Company on Van Nuys Boulevard in Van Nuys.

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

Q. All you know about the man you call Frank is that he is in San Jose? [10]

A. He is in San Jose in the furniture business.

Q. All right. Now, when you bought in there in 1952 you took charge of the business?

A. Oh, yes.

Q. Mr. Simms and—who was the other gentleman? A. Mr. Kiefer.

Q. ——and Mr. Kiefer had nothing actually to do with the management? A. That is right.

Q. What I mean is I don't want to examine you as to what your agreements contained for the very reason I stated, that I have known very many honest businessmen who will misstate the effect of a legal document. Therefore I would like to get it. If I can't get it I may have to ask you for it.

Mr. Magid: What is his phone number?

The Witness: Whose?

Mr. Magid: Your accountant's.

The Witness: WEbster 1-1709.

Mr. Magid: Let me call the accountant and see if I can get it.

Mr. Sterry: All right.

(Short recess.)

Mr. Magid: He is out and they don't expect him in for an hour or two.

Mr. Sterry: The thing is I don't think we will get it [11] now. I will try and conclude and then see if we can get it. If you will send me a copy of it——

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

Mr. Magid: If he has it we will get it for you.

Mr. Sterry: ——I will read it over and I probably won't want to ask him anything about it, but I will reserve the right to.

Mr. Magid: O.K.

Q. (By Mr. Sterry): Mr. Rudner, before going on with this store in Van Nuys, your present store, didn't you buy out another store in Reseda?

A. Let me hear the question again.

Q. The question is didn't you buy a furniture store in Reseda known as the Reseda Furniture Company?

Mr. Magid: Before you bought Van Nuys?

The Witness: No, I bought in Van Nuys first.

Q. (By Mr. Sterry): Then you did buy a Reseda Furniture Company? A. Afterwards.

Q. Did you put that in a corporation?

A. Yes.

Q. How long did that run?

A. About seven or eight months. I tried to put my son in it but he wouldn't take care of it.

Q. You operated that under the name also of the Safeway Furniture Company?

A. Safeway Furniture Corporation. [12]

Q. Corporation? A. Yes.

Q. Now, we have made that a party defendant and the answer alleges that it has gone out of business. A. Yes.

Q. Who were the officers of that corporation?

A. My wife, my son and I.

Q. That hasn't been operating? A. No.

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

Q. As I understand it, the store ran for a few months and then ceased operations. Is that right?

A. Yes.

Q. What became of its stock of goods and furniture and fixtures and so forth?

A. I sold it to these people. They have since gone out of business. I seen an ad in the paper not long ago that they were liquidating. Incidentally, they named it the Reseda Furniture Mart. It used to be the Reseda Furniture Company when I bought it.

Q. What happened to the Safeway Furniture Corporation? A. That is out.

Q. Well, I know it is out. You allege it doesn't intend to go back in business. Is the franchise still in effect, do you know? A. No, sir. [13]

Q. It isn't? A. No, sir, that is deceased.

Q. All right. Then I will confine my questioning to the Van Nuys store. A. All right.

Q. I might ask do you know whether your corporation has been dissolved or whether it has paid its franchise tax or otherwise?

A. No, I haven't paid any franchise in the last couple of years.

Q. All right. Let's continue with your store on Van Nuys Avenue, isn't it?

A. Van Nuys Boulevard.

Q. Where is that with reference to the center of town in Van Nuys?

A. It is right in the center of town.

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

Q. Generally what line of furniture do you carry?

A. Living room, bedroom, kitchen, that is, dinette sets, stoves and refrigerators, springs and mattresses.

Q. Carpets? A. Rugs, oh, yes.

Q. You carry, do you, miscellaneous household articles such as brooms? A. No.

Q. Don't you?

A. No, we carry no brooms, no dishes. We [14] don't carry things like that. No mops, no brooms, or anything.

Q. Do you carry any patio furniture?

A. No, sir.

Q. At the time you bought into this limited partnership where were you living?

A. Where was I living when I first bought in?

Q. Yes. A. I don't know the number.

Mr. Magid: What town?

The Witness: In Los Angeles. It's on Almayo Avenue, West Los Angeles.

Q. (By Mr. Sterry): How long had you lived in Los Angeles or its vicinity prior to the time you purchased in this limited partnership?

A. About six years.

Q. Where did you live before that?

A. Ohio.

Q. Ohio? A. Yes.

Q. During this six years that had been here you knew, of course, of Safeway Stores, Incorporated.

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

didn't you? A. Incorporated?

Q. Well——

A. I never knew of it. I knew Safeway Stores were big. I never knew they were incorporated. [15]

Q. No, they don't use that, but the name of the plaintiff is Safeway Stores, Incorporated.

A. I never heard anything about it until my attorney come up with it.

Q. You never heard anything except "Safeway"? A. That's all I ever heard.

Q. You knew there was a large chain of grocery stores or food markets operating under the name of Safeway? A. Yes.

Q. You knew generally their form of advertising, didn't you? That is, you had seen many of their advertisements in the papers and in the stores?

A. I've seen a lot of advertisements, you know what I mean, but I never noticed.

Q. Did you ever patronize any of the stores?

A. I sure did. I still do.

Q. And you had seen over every store the name "Safeway"? A. Yes, sir.

Q. As you say, you never heard of the word "Company," the word "Incorporated," or anything else; you just saw the word "Safeway"?

A. That's all. I never even looked for bargains. I'd just go in and buy.

Q. You knew generally that they had been operating throughout California and a large part of the United States, [16] didn't you? A. Yes.

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

Q. After you undertook this limited partnership how long was it before these other two gentlemen who were the limited partners retired?

A. Well, I would have to say between eight months and a year.

Q. Between eight months and a year after?

A. Yes, sir, I would say about that long.

Q. It might be a month or two longer, or a month or two shorter, but as near as you can fix it it was between eight months and a year?

A. Yes.

Q. Did they do it voluntarily through an arrangement of paying them whatever their investment was? A. That is right.

Q. Since then you have been operating it as your own business? A. That is right.

Q. How about your son; has he any interest in the business with you?

A. No, sir. May I explain?

Mr. Magid: No, that's all.

The Witness: All right.

Mr. Sterry: Let him explain. I'd like to get the story. [17]

Mr. Magid: Just answer the question.

The Witness: All right.

Q. (By Mr. Sterry): Go ahead.

A. I'll tell you how he came in and how he got out.

Q. All right.

A. He got married and I thought he would set-

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

tle down if I would give him a little partnership. It didn't last very long, so when they split up and got divorced it was over. That's what a father tries to do.

Q. I don't want to pry into your personal life or that of your son, but he was your partner for a short period of time? A. That is right.

Q. About when? I don't care exactly, but approximately?

A. I don't know the dates. He was only partners with me five or six months, I guess. I took him in about June, '53, and his divorce just became final, didn't it?

Mr. Magid: About a year.

The Witness: Yes, just about a year ago he went out.

Q. (By Mr. Sterry): He was a partner with you, then, for about a year?

A. About a year.

Q. How about your wife; has she any interest in it except any community interest?

A. No. [18]

Q. During all the time since you bought into this limited partnership or formed this limited partnership, up to the present time, you have actually managed and run the business?

A. That is right.

Q. Have you had charge of the advertising?

A. Yes, sir.

Q. In what papers have you advertised?

Plaintiff's Exhibit No. 9—(Continued)
Deposition of Morris Rudner.)

A. The green sheet—that is the Van Nuys News, nd the Reseda Sun. That is the West Valley paper.

Mr. Sterry: So as not to have the record too ong, would you read me that last answer so I can ollow it?

(Record read.)

Q. (By Mr. Sterry): You speak of the Van Iuys News as the green sheet?

A. That is a nickname for it.

Q. That is what they call it? A. Yes.

Q. Those are the only two papers you have ad-ertised in?

A. Yes, that and the West Valley paper.

Q. Have you done any radio advertising?

A. About one month, that's all.

Q. When was that?

A. Oh, a couple of years ago.

Q. What station was that that you advertised n? [19]

A. I think it is KGIL. I am not sure.

Q. Can't you look it up and be sure about it?

A. I can find out in a minute.

Mr. Magid: How?

The Witness: Call Marty. No, he's not in. I ink it is KGIL.

Q. (By Mr. Sterry): KGIL?

A. That is right.

Q. When you read this over—I am not going to ntinue the deposition for this, but when you read

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

it over please look it up and be sure, and if it isn't correct I will not make any charge against you for being incorrect here, but just give us the correct name. A. All right.

Q. And the dates. A. All right.

Q. Did you write out the ads that were to be used over the radio?

A. No, the gentleman that came down to make up the radio ads made them out.

Q. After talking to you? A. Yes.

Q. In all of your radio ads the name "Safeway" was the one that was used, wasn't it?

A. Safeway Furniture Company.

Q. Are you quite certain of that? [20]

A. Yes, sir.

Q. You have seen all the advertisements they have printed in this green sheet, haven't you?

They printed none that——

Mr. Whelan: Answer audibly, Mr. Rudner.

The Witness: Yes. I am sorry.

Q. (By Mr. Sterry): They haven't published any advertisements that you haven't written or authorized, have they?

A. Well, I don't see them all because when I am not there the salesman takes care of some of that stuff, you see.

Q. All right. You have a salesman, then, who has authority when you are not there to approve advertising?

A. Well, yes, to a certain extent.

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

Q. Mr. Rudner, to rather short-circuit it, we served under the Rules of Federal Procedure a request for admission of facts on your counsel, and in them we asked with reference to advertisements. Have you seen those? A. Yes.

Q. Are there any of the advertisements set out there that you didn't authorize?

A. I don't remember any of them that I didn't authorize.

Q. Are there any of them in our request for admission that you didn't see when it came out in the paper? [21]

A. A lot of them, because I never checked the papers. I know when the bill comes I pay it. You know, I run them classified all the time.

Q. I show you my office copy of the request for admission, Exhibit M, and ask you if that was an advertisement run in what you call the green sheet?

A. It may or may not be. I don't remember, sir.

Q. You wouldn't say you didn't authorize that, would you? A. No. I don't remember.

Q. Well, you have been billed for these advertisements in the green sheet, haven't you?

A. Yes, sir.

Q. And you paid them? A. Yes, sir.

Q. You know of no advertisements that they have run that they haven't billed you for?

A. Not that I know of, sir.

Q. All right. At the time you bought into this store and after you continued to run it you knew, I

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

believe you stated, of the very large operations of the plaintiff's food markets under the name of Safeway? A. Yes, sir.

Q. You knew they had built up a very great reputation under that name, didn't you?

A. Yes, sir. [22]

Q. You say you were a patron of the Safeway Stores? A. Yes, sir; still am.

Q. You say you knew they had built up a reputation. You knew that it was a very favorable one, didn't you?

A. I buy or my wife buys all her meats there. It's the best meat you can buy.

Q. Well, I know.

A. Well, do you want an honest answer?

Q. Yes. A. Excuse me.

Q. Regardless of what you say, you knew that the reputation of Safeway Stores, the food market, was a very favorable one, didn't you?

A. Yes, sir.

Q. Mr. Rudner, I show you Exhibit P to our request for admission, a copy of a letter which I dictated to you, and I will ask you if you ever received that letter.

A. No, I never got this letter here.

Mr. Magid: You never got this letter?

The Witness: I never got that letter.

Q. (By Mr. Sterry): Did you get any from this firm? A. Yes, sir, on April 2nd, 1954.

Q. This is dated October 20, 1953. A. Yes.

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

Q. May I see the copy of the letter you have? Just show it to me. I wouldn't ask you to take it out. [23]

(The document referred to was passed to Mr. Sterry.)

Q. (By Mr. Sterry): Your counsel shows me a letter of April 2nd, 1954, addressed to the Safeway Furniture Company, 6416 Van Nuys Boulevard, signed in type by Gibson, Dunn & Crutcher, by myself, Norman S. Sterry. You received that in the due course of mail? A. Yes, sir.

Q. You have no receiving stamp—oh, yes, you've got it marked on here "Received April 6."

A. That's when Mr. Magid received it.

Q. Oh, you got it and sent it to him?

A. Yes, sir.

Q. You didn't make any reply to that letter, did you? A. No, sir.

Mr. Sterry: Now, Mr. Magid, if you would be good enough to take that off I would like to have a photostatic copy made of it.

Mr. Whelan: Mr. Sterry, we do have a copy. It was stuck to the back of the other one.

Mr. Sterry: We have a copy of this in my file so that's all right. What I would like to do would be to take just a minute to have a photostat made. We have a photostating machine here, and if you have no objection, if you can take that off I'll have Marty

Plaintiff's Exhibit No. 9—(Continued)
(Deposition of Morris Rudner.)

take it down and have it photostated and return the original to you. I have only [24] a few more questions, if you will wait until Marty comes back.

Mr. Magid: Sure.

(Discussion outside the record.)

Mr. Sterry: I will offer that letter now that you have given us as Exhibit A.

Mr. Magid: No objection.

Mr. Sterry: The Notary can photostat the copy. I don't suppose you would care for a photostat for your files as long as you have the original.

Mr. Magid: No.

Mr. Sterry: And I don't think we need it for our copy.

(The document referred to was thereupon marked Plaintiff's Exhibit A for Identification.)

Q. (By Mr. Sterry): The complaint was filed December 1, 1954. Did you think, Mr. Rudner, the name "Safeway" had any special value to you as a furniture company?

A. Yes. I bought the name when I bought the store so I continued to use it. Is that the answer you wanted, sir?

Q. No, Mr. Rudner, I don't want any answer except a truthful one, and I am not intimating that you weren't truthful. But that isn't an answer to my question. A. All right, sir.

Plaintiff's Exhibit No. 9—(Continued)
Deposition of Morris Rudner.)

Q. You allege in your answer that you bought he name and that is a question of law which I am ıot going to [25] argue with you. Personally, as I ınderstand the situation, there was a partnership ımning this store out there under that name.

A. That is right.

Q. You bought an interest in it?

A. That is right.

Q. And then the other partners retired?

A. That is right.

Q. All right. Now, what I am asking is not as to ·our legal right to use that name. That's what this ıwsuit is about and Mr. Magid and I probably ·on't agree. That's why we are having a suit. I am sking you if you thought that "Safeway" had any pecial value to you as a furniture company?

A. Not at that time.

Q. It didn't? A. No.

Q. Why did you continue to use it?

A. Because the sign was there. We had a big lectric sign. The sign and all the stationery and verything like that, I just continued to keep on ısing it.

Q. Have you the same sign there now?

A. Yes, sir.

Q. Your counsel has very graciously furnished ıe a photograph of a sign. We have already had hat but I will show that to you and ask you if that s the electric [26] sign that you had.

A. Yes, sir.

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

Q. Your reason for not wanting to change was simply the cost of changing that name?

A. That is right, yes.

Q. How about the present time?

A. Well, I built up good will. I have built up a business there.

Q. Is there any special value to you in the name "Safeway"?

A. Safeway Furniture Company.

Q. Well, do you think the Safeway Furniture Company brings you more business than if you used the Van Nuys Furniture Company?

A. I think so.

Q. Why?

A. Because I built up a good reputation there.

Q. Aside from that, if you used the word "Van Nuys Furniture Company," or any other name couldn't you build up the same reputation?

A. Not all over again.

Q. You couldn't?

A. I would have to start all over again.

Q. When you said in a previous answer that it had no value then, at what time were you referring?

A. When I bought it. [27]

Q. How about the time when you got this letter on April 2nd, 1954?

A. Well, it had some value to it.

Q. How much? A. I wouldn't know.

Q. You think, however, the principal value has been built up since then?

Plaintiff's Exhibit No. 9—(Continued)
Deposition of Morris Rudner.)

A. Since I bought it?

Q. Since my letter to you of April 2nd, 1954. ow please don't ask your counsel.

A. I am a little mixed up on the question here, r.

Q. All right. You said a little while ago that the ord "Safeway" didn't have any special value then, nd you said you referred to when you bought it. I m asking you when you got this letter of April 2nd, 954—— A. Oh, that's clear.

Q. ——have you built up any value since then?

A. Yes, I have built up a business there, a good usiness.

Q. Then the principal value that attaches to the ame you built up since then?

A. Since the letter?

Q. Yes.

A. What date was that letter, sir?

Q. That letter is dated April 2nd, 1954.

A. Oh, no, before that. [28]

Q. Well, have you built up any since then?

A. I don't get that.

Q. Now don't ask your counsel.

A. I am all mixed up. I am sorry.

Mr. Magid: If you don't understand the ques- on, say so.

The Witness: I don't understand the question, r.

Q. (By Mr. Sterry): You bought into a busi- ess or you formed a limited partnership by a con-

Plaintiff's Exhibit No. 9—(Continued)
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tract which you haven't produced yet but will if you can, of a store that was operating at this same place under the name "Safeway Furniture Company." You said at that time the word "Safeway" didn't have any special value; that it has a value now only because you built up a good will to it.

A. That is right.

Q. Now, I am asking you when that good will started.

A. When I bought the other fellows out I started to put all my time in there day and night, and I worked up a business in Safeway Furniture Company.

Q. You bought a business and you have been steadily increasing it? A. Yes, sir.

Q. All right. You bought in in 1952?

A. Yes, sir.

Q. And you bought them out in 1953?

A. Right. [29]

Q. What time in '53?

A. I don't have those dates.

Q. I am asking you in '53 approximately when.

A. The early part of the year '53.

Q. Then it has been about three years ago?

A. Yes, sir.

Q. It is your idea that the business you built up under this name, you started building it up from the time you bought them out? A. Yes, sir.

Plaintiff's Exhibit No. 9—(Continued)
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Q. And you have been gradually increasing it all the time? A. Yes, sir.

Q. Then it has increased quite a bit since this letter of April 2nd, which is almost two years ago?

A. Yes, sir.

Q. That letter was received about a year, then, after you bought them out? A. Yes, sir.

Q. Then the good will which you claim to be building up under this name had been starting for about a year and has been increasing during the last two years?

A. Yes, sir. You will have to forgive me because I have never had anything like this.

Mr. Magid: Just sit back and relax.

Q. (By Mr. Sterry): What proportion of your present [30] good will would you say has been built up in the last two years? A. I wouldn't know.

Q. It has been increasing gradually right along at about the same increase?

A. I wouldn't know unless I looked at my books.

Q. Have you got your gross sales for the first year after you bought the other two people out?

Mr. Magid: Off the record.

(Discussion outside the record.)

Mr. Magid: The accountant has those figures, Mr. Sterry.

Mr. Sterry: Wait a minute gentlemen. I think at your convenience we'd better continue the further taking of the deposition until you can get those

Plaintiff's Exhibit No. 9—(Continued)
(Deposition of Morris Rudner.)

things exactly and see whether or not you can get your partnership articles. I will continue it at your convenience. I don't like to ask a man to guess because my experience has been that sometimes they get very wrong.

Mr. Magid: Let's put it this way, Mr. Sterry. We will submit to you the figures that our accountant will furnish us as to the gross sales for the calendar years——

Mr. Sterry: No, what I'd like to do is this. I would like to know precisely when he bought these other two gentlemen out whose names escape me.

Mr. Magid: I'll get you that. [31]

Mr. Sterry: Then I would like the gross sales and the net sales from then on until the end of that calendar year, and each calendar year thereafter, along with the advertising expenses.

Mr. Magid: The advertising expenses you have. We are furnishing you with those now.

Mr. Sterry: These that you hand me are the advertising expenses?

Mr. Magid: Yes. It must have been April of 1952, that you bought them out. Here it is. See that?

The Witness: Then that's when it was.

Mr. Magid: It should be around April 1, 1952. That's when it starts.

The Witness: All right.

Mr. Sterry: Mr. Magid, I see here you have April 1st, 1952, and you have the figures from April

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

1st, 1952. Now, I don't want at the trial to come in and have Mr. Rudner say that that was a mistake, and it might be. I assume that it is correct?

Mr. Magid: It is the only figures we have.

Mr. Sterry: I know. Now, have you got any extra copies of this photograph?

Mr. Magid: Yes.

Mr. Sterry: If I can, I would like to offer this photograph as our Exhibit B, and you can put it in my copy of the deposition. [32]

(The photograph referred to was thereupon marked Plaintiff's Exhibit B for identification.)

Mr. Sterry: I now offer in evidence as our Exhibit C the statement of advertising expense. Will you mark that "C"? Then I want to examine the witness about it.

(The document referred to was thereupon marked Plaintiff's Exhibit C for identification.)

Mr. Sterry: Have you got a copy of this, Mr. Magid?

Mr. Magid: Unfortunately, no. I just have the original.

Q. (By Mr. Sterry): Do I understand now that you purchased the store on April 1st, 1952?

A. Whatever it says.

Q. That's what is shown.

Plaintiff's Exhibit No. 9—(Continued)
(Deposition of Morris Rudner.)

A. That must be it, then. My accountant got this together.

Q. I know, but on this Exhibit C we have 4/1/52, then 4/1/53, 4/1/54, and 4/1/55, so I assuming for the present that you purchased your interest in the partnership 4/1/52 and it was about a year later that you bought them out and became sole proprietor except for the few months that your son had a partnership? A. Yes, sir.

Q. Now, for the year 4/1/52 you have $11,928.56 for advertising, for your next year 4/1/53 you have $14,788.44, a drop in the year 4/1/54 to $8,885.56, and the [33] year 4/1/55 it was $2,304.05.

Now, apparently, according to this, you have been doing less advertising each year? A. Yes, sir.

Q. What is the reason for that?

A. Well, a lot of new stores have come into our neighborhood and brought more people into town without advertising. Before that I did a lot of display advertising and after that I kind of cut down and went into classified, which is cheaper.

Q. What do you mean by "classified"?

A. In the back of the paper. This is classified. It's a lot cheaper than display advertising.

Q. Well, I want you to furnish the exact date and be certain that it was April 1st, 1952, that you bought them out and then the exact date when you became sole proprietor. I also want your gross and net sales from then on until the present time, including up to the first of April of this year. This isn't

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

the first of April but you can make it the first of March because I understand that accountants always want to be about a month behind. Then I want you to see if you can find your limited partnership agreement and the date. Now, I don't think it will be over an hour's examination. What time would be convenient to you, Mr. Magid, to continue the deposition?

The Witness: I have a sick wife. [34]

Mr. Magid: I know you have a sick wife, but just relax. I will first have to get the papers from the accountant. I want to say to you in all sincerity when I got these figures today I should have gotten the gross and net sales because I asked for them, and you are asking me now to give you an answer based upon somebody else giving me some information. This is his tax season so the Lord only knows. Now, my next free day will be April 3rd.

Q. (By Mr. Sterry): Who is your accountant?

A. Sidney Gittler.

Q. Where is his office?

A. On Beverly Boulevard.

Q. Do you know the number?

A. No. I can look it up in the book. It is Gittler & Associates, or Gittler Associates, isn't it?

Q. Is Gittler the man who takes care of it?

A. Yes, sir. He has taken care of my books ever since I have been in business.

Mr. Sterry: All right. Now, Mr. Magid, I am perfectly willing to accommodate you. I realize if

Plaintiff's Exhibit No. 9—(Continued)

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he is an accountant at tax time he is probably very busy. I am perfectly willing to continue this to any time that is reasonably agreeable to you and your client. After the first of April I will probably be unable to give it any attention until after the 20th. The case is set for the 21st of May.

Mr. Magid: The 26th of April would be convenient for [35] me.

Mr. Sterry: What date is that?

Mr. Magid: April 26th, which will be exactly four or five weeks from today. By that time I am sure we will have the information.

Mr. Sterry: April 26th is agreeable to me. Do you want it in the morning or in the afternoon?

Mr. Magid: No, the afternoon.

Mr. Sterry: We would also like a breakdown of just what the advertising was and the papers and so forth. All we want to do is just get the facts, Mr. Magid.

Mr. Whelan: This was going to be offered, wasn't it, for the deposition?

Mr. Sterry: Yes.

Mr. Whelan: I wanted him to check that that was a true copy. The "Received" came through from the back side.

Mr. Magid: O.K.

Mr. Sterry: What did you say came through?

Mr. Magid: My "Received" stamp.

Mr. Sterry: That was on the back?

Mr. Magid: Yes.

Plaintiff's Exhibit No. 9—(Continued)
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Mr. Whelan: And it came through.

Mr. Sterry: I will ask you to mark this photostat and it will be understood that the "Received" which appears on the face of it was on the back of the original and in photostating it came through as on the face. [36]

Mr. Whelan: That is on the copy of the letter your client received, Mr. Magid?

Mr. Magid: Yes.

Now, let me repeat what you want, Mr. Sterry. You want the name and date——

Mr. Sterry: I'll tell you, Mr. Magid. Let me put it this way. We have specified these things. You will probably want a copy of this before then, but to avoid any chance of misunderstanding Marty will write out in the next day or two exactly what we want and send it to you.

Mr. Magid: Will you be prepared, Mr. Sterry, on the continued date, so that we don't have to write a lot of things, to admit that the plaintiff has sales for the calendar year of 1955 $1,738,889,565.00, which was an increase of 6.18 per cent over sales for the previous year?

Mr. Sterry: Are you taking those from the figures we sent you?

Mr. Magid: No, I am taking these from the newspaper report of Safeway Stores and I am asking if you would be prepared at the next session to admit them.

Mr. Sterry: No, I won't be prepared. If you will

Plaintiff's Exhibit No. 9—(Continued)

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write me what it is I will write up to their accountant. That way I can tell you very easily whether we will admit it or whether we won't.

Mr. Whelan: Before we continue this, Mr. Sterry, there might be a couple of more things we can get out of the way [37] at this time. I think one we ought to ask them for is a copy of the agreement at the time he bought out the two partners.

Mr. Sterry: We have asked them for that.

Mr. Whelan: No, we just asked them for the limited partnership agreement.

Mr. Sterry: That was it, wasn't it?

The Witness: That was it.

Mr. Whelan: Didn't you have an additional agreement when you bought out Kiefer and Simms?

Mr. Sterry: We will send you a list of what we want.

The Witness: O.K.

Mr. Sterry: As to the figures, I have absolutely no knowledge as to the amount of sales we had at any time except as they are furnished me by my client.

Mr. Whelan: What time do you want to continue that deposition to?

Mr. Magid: 2:00 p.m.

Mr. Whelan: 2:00 p.m., at the same place?

Mr. Magid: At the same place.

Mr. Sterry: If there is anything to their sales, they have audits and there will be no trouble admitting anything that is correct, but I won't admit

Plaintiff's Exhibit No. 9—(Continued)
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something from a newspaper. Anything you want on that you can ask either formally or you don't have to ask for it formally; if you will send it to me in time so I can write up there I will [38] get it.

Mr. Magid: We will do that.

Now, in response to your request for admissions——

Mr. Sterry: You don't have to take this, or do you want him to take it?

Mr. Magid: No, you don't have to take it.

(Discussion outside the record.)

Mr. Sterry: All right, supposing you go ahead.

Mr. Whelan: Just for clarification of the record let me state that counsel for the defendant is now making certain admissions with regard to plaintiff's request for admissions filed on March 15, 1956.

Mr. Sterry: All right.

Mr. Magid: We will admit your Request No. 1 and No. 2 except that in No. 2 we deny that the corporation is now existing.

We admit No. 3, No. 4 and No. 5.

As for No. 6, we admit everything except that the co-partnership is not a citizen because it no longer exists.

Mr. Sterry: In other words, you admit that it was but that Mr. Rudner is now the sole proprietor?

Mr. Magid: Right.

We admit No. 7. We admit No. 8. We deny No. 9. We deny No. 10.

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

Mr. Sterry: Well, I think the proper form is that you do not admit 9 or 10. [39]

Mr. Magid: We do not admit 9 and we do not admit No. 10.

We do not admit that part of No. 11 because we do not know that the plaintiff's stores have rendered such items as mops, brooms, furniture polish and floor wax.

Mr. Sterry: Otherwise you admit it?

Mr. Magid: Otherwise it is admitted.

We do not admit No. 12. We do not admit——

Mr. Sterry: Wait just a minute. Let me note something on mine.

No. 12 you don't admit?

Mr. Magid: No. 12 is not admitted.

Mr. Sterry: Now, No. 13.

Mr. Magid: No. 13 is not admitted.

Mr. Sterry: No. 14?

Mr. Magid: No. 14——

Mr. Sterry: Those are the advertisements.

Mr. Magid: Yes. I want to admit them all in one.

No. 14 through No. 28 are admitted. No. 29 is not admitted. No. 30 is admitted.

Mr. Whelan: Is admitted?

Mr. Magid: Yes.

No. 31 is not admitted.

Now, is it 32 that you want the figures changed?

Mr. Sterry: These figures are the correct figures. It is the complaint that left off one number. [40]

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

Mr. Magid: Do you want to send me a letter stipulating——

Mr. Whelan: ——that the complaint can be amended?

Mr. Magid: Yes. Then we admit No. 32 and No. 33——

Mr. Sterry: You admit 33?

Mr. Magid: Wait a minute. Let's see what parts of it we don't.

Mr. Whelan: 33 is the short one. Of course, it takes in the whole affidavit.

Mr. Magid: It takes in the affidavit and I want to read it.

We will admit 31.

Mr. Sterry: 31?

Mr. Magid: Or 33.

As to 34 we admit the first sentence only and do not admit the balance.

Mr. Sterry: You admit the first sentence of 34 but not the balance?

Mr. Magid: Right.

Mr. Sterry: All right.

Mr. Magid: That covers all of your requests.

Mr. Whelan: This is off the record.

(Discussion outside the record.)

Mr. Sterry: Mr. Magid, I think so far as I am concerned your admissions here should be entirely sufficient, but the deposition isn't closed and can't be closed until after [41] we have examined him

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

and, for the record, I think I will ask Marty to draw up a stipulation following that and just send it to you and you can check it.

Mr. Magid: O.K.

Mr. Sterry: Then we will stipulate that that will be in the place of an answer.

Mr. Magid: Fine.

Mr. Sterry: It is also stipulated that your admissions here are a matter of record and the other is simply a supplement.

Mr. Magid: Very well.

Mr. Sterry: I am sorry to ask you to come back, Mr. Rudner, but that's part of the job. We will get you a letter of the various things we want.

Mr. Magid: Yes.

(Whereupon the deposition was continued until 2:00 p.m. Thursday, April 26, 1956.) [42]

(The taking of the deposition of Morris Rudner was resumed on Thursday, April 26, 1956, at 10:00 a.m., at 634 South Spring Street, Los Angeles, California; Gibson, Dunn & Crutcher, by Martin E. Whelan, Jr., appearing for the plaintiff; William B. Magid, Esq., appearing for the defendants, and the following proceedings were had:)

Plaintiff's Exhibit No. 9—(Continued)
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Direct Examination
(Continued)

Mr. Whelan: Referring to this letter where we requested certain documents, I was wondering what you were able to dig up here.

Mr. Magid: Pretty much every one except the No. 1. We have the notice of cancellation of certificate. That's your No. 2.

Mr. Whelan: Do you mind if I see what you have?

(The document referred to was passed to Mr. Whelan.)

Q. (By Mr. Whelan): Mr. Rudner, your attorney has given me a copy, apparently a signed copy of a notice of cancellation of certificate to articles of limited partnership. It states here in effect that you and Frank Kiefer were terminating your limited partnership. That is dated May 14, 1953. Is that approximately the date? Do you remember the specific date now on which you terminated that partnership, or was it on or about that date?

A. It was within a radius of a couple of weeks.

Q. A couple of weeks of May 14, '53? [43]

A. Yes. I don't remember dates very much.

Mr. Magid: You've got them right here.

The Witness: Yes.

Q. (By Mr. Whelan): It was within a couple

Plaintiff's Exhibit No. 9—(Continued)
(Deposition of Morris Rudner.)

of weeks of that time? A. Yes.

Q. I notice that Sam Simms isn't mentioned in there. Did he get out before that? A. Yes, sir.

Q. About how long before?

A. About there or four months before.

Q. So it was about two weeks before May 14, 1953, perhaps, that you eventually became sole owner and after that, or shortly after that you and your son became partners. Is that correct?

A. That is correct.

Mr. Whelan: I don't think we need to keep this.

Mr. Magid: I don't think so. It's a matter of record, anyhow.

Mr. Whelan: Could I see what else you've got?

Mr. Magid: Yes. We have these letter contracts which led to the notice of cancellation or followed it.

Mr. Whelan: We'll go off the record a second.

(Discussion outside the record.)

Mr. Whelan: We'll go back on the record.

Q. (By Mr. Whelan): Your Counsel has furnished me a [44] copy which is also a signed copy, Mr. Rudner, of an agreement between you and Frank Kiefer on May 14, 1953, or dated that date. Is that the agreement whereby you purchased from him his interest in the partnership?

A. Yes, sir.

Q. Would you care to just place your initials, perhaps, on the first page of that, just for identification?

Plaintiff's Exhibit No. 9—(Continued)
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(Witness marks on document.)

Mr. Whelan: May it be stipulated that if any portion of this agreement is asked for by plaintiffs for use in court, that this particular document which has been signed will be produced, after it has been returned by us to you?

Mr. Magid: Yes, so stipulated.

Mr. Whelan: Now, what else do you have there, Mr. Magid?

Mr. Magid: We have the lease of the premises dated May 1, 1953, wherein Mr. Rudner is the lessee.

Q. (By Mr. Whelan): Before we go into anything more, Mr. Rudner, did you have any agreement between you and Kiefer, on the one hand, and Simms, on the other, when he pulled out of the partnership?

A. When he pulled out of the partnership it went on like it was. See?

Q. I meant did you have any agreement with him whereby you purchased his interest at the time?

A. No. It just went on. He pulled out. He got paid, you know, and he pulled out and we just kept on going. [45]

Q. He was paid, but you didn't enter into any formal agreement at the time? A. No.

Mr. Whelan: We can go off the record a second.

Plaintiff's Exhibit No. 9—(Continued)
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(Discussion outside the record.)

Mr. Whelan: We'll go back on the record.

Q. (By Mr. Whelan): I show you a statement which sets forth the sales for certain periods broken down from 4-1-1952 through 2-20-1956.

A. My accountant made this up. He has all my books.

Mr. Magid: Just wait until the question is asked.

The Witness: Excuse me.

Q. (By Mr. Whelan): I assume your accountant did make that up and not you personally?

A. Yes.

Q. I believe we had the accountant's name previously in the last deposition? A. Yes.

Q. Will you repeat it, just in case we need that?

Mr. Magid: What is his full name?

The Witness: Sidney Gittler.

Q. (By Mr. Whelan): I notice this does not include the net sales. Is this figure gross sales, do you know?

Mr. Magid: It must be gross.

Mr. Whelan: Did you have many copies made up of this?

Mr. Magid: No, just the original and one copy is all [46] I've got.

Mr. Whelan: Would you mark this for identification?

Plaintiff's Exhibit No. 9—(Continued)
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(The document referred to was thereupon marked Plaintiff's Exhibit D.)

Mr. Whelan: I will submit for attachment to the deposition the document marked Plaintiff's Exhibit D, which I think we will stipulate is the analysis of sales and advertising expense which counsel for the defendant has submitted to me here.

Mr. Magid: Right.

Q. (By Mr. Whelan): Mr. Rudner, on March 15th a set of requests for admissions were filed by plaintiffs, which your counsel answered at the last portion of this deposition. Now, Request No. 29 was at that time denied. That request states that the advertisements designated in each of the requests numbered 14 through 28 above, and each of them, were inserted in the Van Nuys News at the instance and request of defendant Safeway Furniture Co., a partnership, Morris Rudner, Gerald Rudner, and each of them, the format and composition of each of said advertisements was made up by the aforesaid defendants, and each of them, the advertisements, and each of them, were paid for by the aforesaid defendants, and each of them. Now, at that time your counsel admitted that those particular advertisements, 14 through 28, had appeared in the Van Nuys News. I was wondering why you denied our Request No. 29. [47]

A. I didn't make them up. You see, the news-

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

paper man came in—you know what I mean—and would make them up for us.

Q. When the newspaper man came in, he came in at your request, did he?

A. They come around each week for an ad.

Q. Were these particular ads inserted either at your request or at the request of one of your employees acting for you?

A. It could be both ways.

Q. But in any particular case would it be one or the other? A. Yes.

Q. We are now speaking of those particular advertisements that were numbered 14 through 28 in the request for admissions? A. Yes.

Q. Those were inserted in the Van Nuys News either pursuant to your request or an employee acting for you? A. Yes, sir.

Q. You paid for those ads, then?

A. Yes, sir.

Q. Now, Mr. Rudner, have you during the period of your operation of the store on Van Nuys Boulevard—and I am speaking now first of the period after which you bought out Kiefer and Simms and were either sole proprietor [48] or in partnership with your son—have you had any complaints from customers relative to your practices or methods?

Mr. Magid: That is objected to as not being within the issue of the case.

Mr. Whelan: Well, I believe it is within the is-

Plaintiff's Exhibit No. 9—(Continued)

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sues since one of the issues is the effect on the name of Safeway Stores, and accordingly, any particular complaint would be pertinent.

Mr. Magid: Complaints about what?

Mr. Whelan: Complaints about his sales methods and practices.

Mr. Magid: Well, O.K.

Q. (By Mr. Whelan): Do you understand the question, Mr. Rudner?

A. Could I have it again, sir?

Q. Have you since——

Mr. Magid: Let the reporter read it.

(Record read.)

The Witness: All businesses have. I have had a few, yes.

Q. (By Mr. Whelan): By "a few" how many?

A. I don't remember how many.

Q. Do you keep a file of those complaints?

A. Not necessarily.

Q. Do you have any file of complaints that have been [49] made?

A. We just try to rectify them. That's all. In fact——

Mr. Magid: You have answered the question.

The Witness: All right.

Q. (By Mr. Whelan): Do you recall now the names of any of the individuals who made complaints? A. No, sir; I don't.

Q. Do you remember the nature of any of them?

A. No, sir; I don't.

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(Deposition of Morris Rudner.)

Q. What about prior to the time you purchased out Kiefer's and Simms' interest? Did you have many complaints at that time?

A. I had a few, yes, that I took care of, that belonged to them when I took over the store.

Q. Would you say that those were more or less than after you took over the store?

A. I would say they were a few more.

Q. Have you ever had any lawsuits instituted against you arising out of the operation of this store? A. Yes, sir.

Q. How many? A. One or two.

Q. Do you remember the names of the other parties in those lawsuits?

A. Price is the only one I can remember. [50]

Q. Where was that action brought, do you remember what court?

A. It was down in Los Angeles here. I don't remember the court.

Q. Do you remember whether it was in Municipal Court or Superior? A. Municipal.

Q. You mean you think it was the Municipal Court of Los Angeles? A. Yes.

Q. Do you remember any others and what courts they were brought in?

A. I had one in San Fernando, in Small Claims Court, a couple of years ago. That's about all.

Q. Do you remember any others in addition to those two? A. No, sir.

Q. That includes the period both during which

Plaintiff's Exhibit No. 9—(Continued)

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you were sole proprietor and in partnership with your son and in partnership with Kiefer and Simms? A. Yes.

Q. Do you know at all what your gross profit margin is without referring to your books? Do you know what your normal net profit margin runs?

A. No, sir. My auditor is supposed to give me a P&L statement but he never gives it to me. [51]

Q. You mean you don't know how much you make out of the business in a year's period?

A. I make a good living. That's all I know.

Q. But you don't know even roughly the amount that you have made for any year?

A. No, not unless I would get into the books with my accountant.

Mr. Whelan: I think that's all I have, then. Do you have any further questions you want to ask?

Cross-Examination

By Mr. Magid:

Q. Did you ever have any customer come into your store who said they thought they were in a store belonging to plaintiff, Safeway Stores?

A. No. I have furniture signs up above there.

Q. Just answer the question, please.

Did you ever have anybody come into your store and ask for groceries, meats, produce, or household supplies? A. No, sir.

Q. Have any of your customers ever inquired as to whether you were a branch or——

Plaintiff's Exhibit No. 9—(Continued)

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Mr. Whelan: Well, Mr. Magid, I prefer that you don't place completely leading questions in front of him.

Mr. Magid: I am quoting from your complaint.

Mr. Whelan: Well, I know, but you are now questioning [52] your own witness, and I will object to the form of the question.

Q. (By Mr. Magid): Has anybody ever come into your store——

Mr. Whelan: My objection is on the ground that the question is leading.

Mr. Magid: O.K.

Q. (By Mr. Magid): Has anybody ever come into your store and asked whether you were a subdivision of Safeway Stores, the plaintiff herein?

A. No, sir.

Mr. Magid: Let's go off the record.

(Discussion outside the record.)

Q. (By Mr. Magid): Has anybody ever come into your store saying that they believed that the plaintiff, Safeway Stores, is identified or connected with or is sponsoring your store?

Mr. Whelan: Same objection; a leading question.

Q. (By Mr. Magid): Will you answer that? Then you can go into the form at the time of trial.

A. No, sir.

Q. Did you adopt and use the name "Safeway

Plaintiff's Exhibit No. 9—(Continued)
(Deposition of Morris Rudner.)

Furniture" for the sole purpose of trading upon the good will of Safeway Stores? A. No, sir.

Q. As a matter of fact, the name "Safeway Furniture Stores" [53] was not adopted by you but purchased by you. Is that correct? A. Yes, sir.

Mr. Magid: That's all I have.

Redirect Examination

By Mr. Whelan:

Q. Mr. Rudner, what furniture items besides the normal ones I assume you would handle, such as sofas and chairs, beds and bedroom sets, do you handle?

A. Stoves, refrigerators, washers.

Q. Any other appliances? A. Sweepers.

Q. What? Carpet sweepers or vacuum cleaners?

A. No, electric sweepers.

Q. Any other items? Do you handle smaller appliances? A. Radios and TV.

Q. Radio and television? A. Yes.

Q. Do you handle items like electric toasters and things of that sort? A. No, sir.

Q. Do you handle, for instance, television tables? A. To go with table models, yes.

Q. Do you handle smaller tables for breakfast nooks [54] and kitchens?

A. Breakfast sets, yes, sir.

Q. Chairs, I assume, and things of that sort?

A. They're regular sets, the chairs and tables.

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of Morris Rudner.)

Q. I see. Do you handle any miscellaneous items for the living room, such as bookshelves and items of that sort? A. Bookcases, yes.

Q. Magazine racks?

A. I haven't bought any. You can never tell when I will buy some. I haven't bought any.

Mr. Magid: Just answer the question.

The Witness: Oh, I am sorry.

Q. (By Mr. Whelan): Do you ever have customers coming in and asking for items that you haven't stocked, such as, maybe, some particular item of furniture that in your practice you haven't used, and appliances like toasters or anything of that sort? A. No, sir.

Q. Has anybody ever inquired for outdoor furniture? A. No, sir.

Mr. Whelan: I think that is all.

Mr. Magid: That is all.

Mr. Whelan: Do you want to stipulate it may be signed before any Notary Public, and if not signed and filed prior to the trial that copies of the deposition may be used [55] without signature?

Mr. Magid: So stipulated.

/s/ MORRIS RUDNER.

Subscribed and sworn to before me this 17th day of May, 1956.

[Seal] /s/ WILLIAM B. MAGID,
Notary Public in and for the
State of California. [56]

State of California,
County of Los Angeles—ss.

I, Horace E. Snyders, a Notary Public in and for the County of Los Angeles, State of California, do hereby certify that Morris Rudner, the witness named in the foregoing deposition, was, before the commencement of deposition, duly sworn to testify the truth, the whole truth, and nothing but the truth; that said deposition was taken, pursuant to Notice on File at the time and place as herein set forth; that said deposition was taken down in shorthand by me and thereafter transcribed into typewriting, and I hereby certify the foregoing 56 pages contain a full, true and correct transcription of my shorthand notes so taken.

I further certify that it was stipulated by counsel that said deposition may be read, corrected and signed by the witness before any notary public in and for the County of Los Angeles, State of California.

I further certify that I am neither counsel for nor related to any party to said action, nor in anywise interested in the outcome thereof.

In Witness Whereof, I have hereunto subscribed my name and affixed my seal, this 2nd day of May, 1956.

[Seal] /s/ HORACE E. SNYDERS,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed May 21, 1956.

Received in evidence May 25, 1956. [57]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 97, inclusive, contain the original

Complaint;

Answer;

Plaintiff's Request for Admissions;

Stipulation Allowing Amendment by Interlineation to Complaint and Order Thereon;

Stipulations and Orders (3);

Order Dismissing Parties;

Memorandum of Opinion;

Findings of Fact & Conclusions of Law (Lodged);

Judgment (Lodged);

Objections to Findings of Fact & Conclusions of Law and to the form of judgment;

Findings of Fact & Conclusions of Law; and Judgment;

Notice of Appeal;

Designation of Contents of Record on Appeal;

which, together with 1 volume of reporter's transcript of proceedings; and plaintiff's exhibits 1-11, inclusive and defendant's exhibits A & B, all in the

above-entitled case, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit all in this case.

I further certify that my fees for preparing the foregoing record amount to $2.00, which sum has been paid by appellant.

Witness my hand and seal of the said District Court this 21st day of September, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk,

By /s/ CHARLES E. JONES,
Deputy.

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[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 2, inclusive, contain the original

> Petition for an Ex Parte Order Extending Time for Filing Record on Appeal and Docketing the Appeal;

in the above-entitled case, constitute the supplemental transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above case.

Witness my hand and seal of the said District Court this 3rd day of October, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk,

By /s/ CHARLES E. JONES,
Deputy.

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[Endorsed]: No. 15294. United States Court of Appeals for the Ninth Circuit. Safeway Stores, Incorporated, Appellant, vs. Safeway Furniture Co., Inc., et al., Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed September 24, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15294

SAFEWAY STORES, INCORPORATED,

Appellant,

vs.

SAFEWAY FURNITURE CO., Inc., et al.,

Appellees.

## STIPULATION AS TO ORIGINAL EXHIBITS

A. The parties hereto respectfully request that the following designated Trial Exhibits, because of their nature, be considered by the Court in their original form and that the Court dispense with their reproduction in the printed transcript of the records:

(1) Plaintiff-Appellant's Exhibits 1, 2, 3, 4, 5-A to 5-F, inclusive, 6, 7, and 11.

(2) Defendant-Appellees' Exhibit A.

B. The parties hereto respectfully request that the following designated Exhibits to Plaintiff-Appellant's Requests for Admissions filed March 15, 1956, because of their nature, be considered by the Court in their original form, that the Court dispense with their reproduction in the printed transcript of the record and permit them to be de-

tached from said Requests for Admissions so that said Requests for Admissions may be printed.

(1) Exhibits A through Q, inclusive, as incorporated in said Plaintiff-Appellant's Requests for Admissions.

Dated: September 25, 1956.

Requests for Admissions may be printed.

Dated: September 25, 1956.

GIBSON, DUNN & CRUTCHER
NORMAN S. STERRY,

By /s/ NORMAN S. STERRY,
Attorneys for Appellant.

/s/ WILLIAM B. MAGID,
Attorney for Appellees.

[Endorsed]: Filed September 26, 1956.

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[Title of Court of Appeals and Cause.]

## STIPULATION RELATIVE TO FURNISHING COPIES OF EXHIBITS

Whereas, the parties hereto through their respective undersigned attorneys of record have by stipulation requested that the above-entitled Court dispense with the reproduction in the printed record of certain Exhibits in the above-entitled appeal;

Whereas, it is contemplated that the above-entitled Court will proceed in accordance with said request;

Now Therefore, in the event that the above-entitled Court grants said request, then it is stipulated by and between the parties to the above-entitled appeal, by and through their respective undersigned attorneys of record, that appellant may furnish to the Court three photostatic, or other reproduced copies, of the following Exhibits for its use:

(1) Plaintiff-Appellant's Trial Exhibits 1, 2, 3, 4, 5-A to 5-F, inclusive, 6, 7 and 11.

(2) Defendant-Appellees' Trial Exhibit A.

(3) Exhibits A through Q, inclusive, as incorporated in Plaintiff-Appellant's Requests for Admissions.

It is Further Stipulated and Agreed that appellant will furnish counsel for appellees a set of said photostatic copies, or other reproductions, falling within subparagraphs (1) and (2) above, it being understood that said counsel for appellees has a full set of Exhibits A through Q of said Requests for Admissions.

It is Further Stipulated and Agreed that the costs of five sets of photostatic copies, or other reproductions of the Exhibits in categories (1) and (2) above and the costs of three sets of photostatic copies, or other reproductions, of the Exhibits falling in category (3) above, shall be taxable as costs on appeal.

Dated: September 25, 1956.

GIBSON, DUNN & CRUTCHER,
NORMAN S. STERRY,

By /s/ NORMAN S. STERRY,,
Attorneys for Appellant.

/s/ WILLIAM B. MAGID,
Attorney for Appellees.

[Endorsed]: Filed September 26, 1956.

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[Title of Court of Appeals and Cause.]

## DESIGNATION OF POINTS UPON WHICH APPELLANT INTENDS TO RELY

Pursuant to Rule 17 (6) of the Rules of this Court, appellant designates the following as the points on which it intends to rely:

(1) The Findings of Fact and Conclusions of Law do not support the judgment in favor of Defendant. On the contrary, the Findings of Fact show that Plaintiff was entitled to the injunction relief prayed for.

(2) The Court below erred in not adding to the last sentence of Finding of Fact No. IV the following as requested by Plaintiff:

> "* * * and other articles normally carried by the average furniture company, and plaintiff

intends to extend the sale of such items to its stores in Los Angeles."

(3) The Court below erred in not adding to the last sentence of Finding of Fact No. V the following, as requested by Plaintiff:

"* * * and the goods sold by it."

(4) Findings of Fact Nos. IX, X, XI, XII, XIII and XIV are each not supported by the evidence and are each contrary to the undisputed evidence. The Court below erred in failing to find exactly the opposite on all facts covered by each Finding of Fact Nos. IX through XIV, inclusive.

(5) Insofar as Conclusion of Law No. X purports to incorporate into the Findings of Fact and Conclusions of Law of the Court, the Memorandum of Opinion of the Court dated June 18, 1956, and insofar as said Memorandum of Opinion may have become a Finding of Fact (which appellant does not concede) the following Findings therein are not supported by the evidence and are contrary to the undisputed evidence and indeed the exact contrary is established by the undisputed evidence:

(a) that portion of the opinion which purports to find that Defendant did not change the name of his business because it would entail considerable expense;

(b) that portion of the opinion which purports to find that Defendant has not attempted to trade upon the reputation and name of Plaintiff;

(c) that portion of the opinion which purports to find that there is no competition between Plaintiff and Defendant;

(d) that portion of the opinion which purports to find that there has been no confusion in the minds of the public between Plaintiff's stores and Defendant's furniture store;

(e) that portion of the opinion which purports to find that there have been many other businesses using the name "Safeway" since 1925;

(f) that portion of the opinion which purports to find that there is little likelihood of confusion so long as Plaintiff continues to operate a retail food and grocery market and Defendant continues to operate a retail furniture store;

(g) that portion of the opinion which purports to find that Plaintiff's protection must be limited to the retail trade definitely connected and associated with the sale of commodities usually found in a retail grocery and food store;

(h) that portion of the opinion which states or finds as a fact that the Defendant operated his store in Van Nuys under the name of Safeway Furniture Company, Inc., instead of under the name of Safeway Furniture or Safeway Furniture Co., and the finding or implication in the opinion that the Defendant was operating in Reseda through Safeway Furniture Company, Inc., a defunct corporation as to which the suit had been

dismissed, a store under the name of Safeway Furniture Company, Inc.

(6) Conclusions of Law Nos. III, IV, V, VI, VII, VIII, IX and X are each unsupported by the evidence, are each contrary to the uncontradicted evidence, and are each unsupported by the Findings of Fact.

(7) The Court erred in sustaining the Defendant's objection to the following question put to the witness Bauer:

> "Q. Now, Mr. Bauer, I would ask you whether or not in your opinion, from your studying of the advertisements and advertising, those three advertisements of the defendant in this case would or would not cause damage to the plaintiff."

and erred in sustaining the objection to the following offer of proof by the Plaintiff:

> "Mr. Sterry: If your Honor please, let me state what I expect to prove by him, and then if your Honor rules that I can't prove it, why, I shall have to bow to your Honor's ruling.
>
> "I want to show by him that he is qualified, first, as an expert, he has been studying advertising, has been studying those things, that even assuming that a person was not confused by the advertising, that it would nevertheless have a tendency to cause confusion to the buying public in that if anybody patronized this

store, and it was generally known as Safeway Furniture, and they stated, for instance, that they were dissatisfied with any deal, if they stated they got gypped or were dissatisfied with the deal at Safeway, that that would redound, would be detrimental to the plaintiff. Now that, I believe, is the subject of expert testimony." (Tr. pp. 12-14, l. 23-14.)

The Court similarly erred in rejecting a similar offer of proof as to witness S. M. White.

(8) The Court erred in sustaining the objection of the Defendant to the following question put to the witness Frank Denney:

"Q. What has been the tendency, if any, of your competitors to sell merchandise of that character?" (Tr. p. 35, l. 1-2.)

(9) The Court erred in sustaining the Defendant's objection to a question put to him while being examined by the Plaintiff as an adverse witness:

"Q. You knew, didn't you, that they had built up a very high and valuable good will under that name?" (Tr. p. 116, l. 4-5.)

(10) The Court below erred in overruling Plaintiff's objection to the introduction by Defendant of so much of Defendant's Exhibit "A," a stipulation dated May 16, 1956, and filed in the Court below on May 21, 1956, as related to filings of fictitious and corporate names in the office of the County Clerk of Los Angeles County.

(11) The Court below erred in considering the telephone directory showing the number of businesses listed in whose business name the word "Safeway" appeared, such telephone directory not having been in evidence.

(12) The Court below based the essential Findings of Fact and Conclusions of Law (Findings of Fact Nos. XIII and XIV; Conclusions of Law Nos. VI, VII, VIII and IX) upon completely erroneous misconceptions of the law applicable which infected those findings and conclusions.

(13) The Court erred (a) in failing to make any finding on Plaintiff's normal and legitimate area of product expansion in Los Angeles County; (b) in failing to find that the sale of furniture items is within Plaintiff's normal and legitimate area of product expansion; (c) in failing to make any finding as to the likelihood of confusion which might result from such expansion; and (d) in failing to find that confusion was likely to result from such expansion.

(14) The Court erred in failing to make a Finding of Fact that Defendant's use of the name "Safeway" would dilute the distinctiveness of Plaintiff's trade name, or at least to make some finding on this question.

(15) The evidence indisputably establishes (a) Plaintiff's right to restrain Defendant's use of the name "Safeway"; and (b) Plaintiff's right to enjoin Defendant from misleading advertising.

Dated: September 26, 1956.

NORMAN S. STERRY,
HENRY F. PRINCE,
FREDERIC H. STURDY,
IRA C. POWERS,
JAMES R. HUTTER,
GIBSON, DUNN & CRUTCHER,

By /s/ NORMAN S. STERRY,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 27, 1956.